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Post p. 470.

No more important opinion of court has, in recent years, been rendered than that of the United States Circuit Court of Appeals, Eighth Circuit, in the case of Hopkins v. The Oxley Stave Company, on appeal from the United States Circuit Court of Kansas. The case involved, in substance, the validity of a conspiracy in the nature of a boycott, and the suit was by injunction to prevent the defendants (appellants above), a labor organization, from conspiring to carry out a boycott against the plaintiff which had for its purpose the compelling of plaintiff to withdraw from use a newly invented machine for hooping barrels, the objection thereto on the part of the boycotters being that it materially lessened the number of employees required in that department. Thus it will be seen that the principle involved was the right of a labor organization not only to strike against the use of new machinery, but also to institute a general boycott of the firm as a means of compelling its surrender. The court through Judges Thayer and Sanborn held, in effect, that a boycott was not a legal weapon, and that the company boycotted was entitled to an injunction against the association and their sympathizers restraining them from injuring its business. The opinion of the court by Judge Thayer is a model of its kind, clear, logical and convincing. Though almost too long for our columns we hope shortly to be able to publish it in full. The question before the court, as stated by Judge Thayer, was, whether the agreement entered into by the members of the associations to boycott the contents of all staves, casks, barrels and packages made by the Oxley Stave Co., which were hooped by machinery, was an agreement against which a court of equity can relieve, preventive or otherwise. Answering this in the affirmative, he says, in substance, that the object of the boycott was to interfere with the plaintiff's business and to deprive him of the right to conduct his business as he thought proper, and that while conceding the right of individuals to form labor organizations for the protection of the interests of laboring classes, yet that the courts and society in general, has, as a rule, condemned boycotts. The right of an individual, he says, to carry on his business as he sees fit, and to use such implements or processes of manufacture as he desires to use, provided he follows a lawful avocation and conducts it in a lawful manner, is entitled to as much consideration as his other personal rights, and the law should afford protection against the efforts of powerful companies to rob him of that right and coerce his will by intimidating his customers and destroying his patronage. The court cites and reviews at length the following cases: Springfield Spinning Co. v. Riley, 6 Eq. Cas. 551; Temperton v. Russell, 1 Q. B. L. R. 715; Barr v. Essex Trades Council (N. J.), 30 Atl. Rep. 881; Hilton v. Eckersley, 6 E. & B. 47; Old Dominion Steamship Co. v. McKenna, 30 Fed. Rep. 48; Casey v. Cincinnati Typographical Union No. 3, 45 Fed. Rep. 135; Thomas v. Cin. N. O. & T. P. Ry. Co., 62 Fed. Rep. 803; Arthur v. Oakes, 63 Fed. Rep. 310; Carew v. Rutherford, 106 Mass. 1; Walker v. Cronin, 107 Mass. 555; State v. Glidden, 55 Conn. 46; Vegelahn v. Gunter (Mass.), 44 N. E. Rep. 1077, 43 Cent. L. J. 464. The following cases relied upon by those opposing the issuance of an injunction were distinguished by the court: Mogul Steamship Co. v. McGregor, 23 Q. B. Div. 598; Continental Insurance Co. v. Board, 67 Fed. Rep. 310; Bohn Mfg. Co. v. Hollis, 54 Minn. 223. Judge Caldwell dissents from the majority of the court in a vigorous opinion of great length, in which he inveighs against the evils of trusts and other combinations of capital, and attempts to show that boycotting if peaceable and orderly is as innocent as a strike. He starts out with the proposition that inasmuch as a refusal of an individual to buy or handle goods of a certain party is concededly legitimate, such action can be no less lawful if adopted by two or more parties in combination. Much of what he says may be considered in the light of a judicial sermon upon popular wrongs, though he attempts to show that the authorities on the law of the question are not all against him. He takes special comfort in the language of the dissenting opinion of Mr. Justice Holmes, in the Massachusetts case of Vegelahn v. Gunter, 44 N. E. Rep. 1077, 43 Cent. L. J. 464. It may be observed that, so far, boycotting has been upheld only in dis-

senting opinions, and beyond exciting surprise and wonderment that a jurist of Judge Caldwell's caliber could be capable of giving his approval to so questionable an industrial expedient, his opinion will have little weight to change the strong current of judicial utterance on the subject.

NOTES OF RECENT DECISIONS.

CARRIERS — WHO ARE PASSENGERS — EMPLOYEE.—In McNulty v. Pennsylvania R. Co., 38 Atl. Rep. 524, decided by the Supreme Court of Pennsylvania, it was held that an employee of a railroad company, while he is being carried by the railroad company under a contract of service, is a passenger, and that the company owes to him all the duties which are due to a passenger. The case of O'Donnell v. Railroad Company, 59 Pa. 239, was followed. It appears, from the facts of the case, that the plaintiff's husband, John McNulty, was employed as a day laborer on the defendant's railroad. He lived at Bristol and worked at various places along the line of the road. By the terms of his contract the railroad company, in consideration of ten hours' labor a day, agreed to pay him $1.20 and carry him on a passenger car to and from his labor each morning and evening. On the evening of the accident, he entered a passenger car of the defendant company to go to his home. While on the way a collision occurred and he was killed. The court found that the contractual relations of the parties were not susceptible of any other conclusion than that the transportation of the plaintiff's husband from and to his home was part of the consideration moving from the company to him, and given him with the $1.20 in payment of a day's wages. This being so, he had virtually paid for his passage home in the car in which he was riding at the time of the collision, and was therefore a passenger and not an employee as soon as his day's work was done and he entered the car for the sole purpose of being carried home.

BANKS AND BANKING — PAYMENT OF CHECK BY MISTAKE—TENDER—RESCISSION.—The necessity of a tender of whatever of value has been received upon the rescission of a contract is illustrated by the case of Northampton Nat. Bank v. Smith, decided by the Supreme Judicial Court of Massachusetts. The holding there is that where a bank has paid money on a check by mistake, it must tender the check before bringing suit to recover the money paid. The court says that "it has often been held that when one wishes to rescind a contract, and recover what he has paid under it, he must first restore whatever of value he has received. Snow v. Alley, 144 Mass. 546, 551, 11 N. E. Rep. 764; Bartlett v. Drake, 100 Mass. 174, 176. The reasons for this rule are fully applicable to the present case. The check, if unpaid, belonged to the defendant, and would be useful and valuable to him, to be used in connection with his own testimony, in establishing a claim against Herbert. It has been held that anything absolutely worthless, like a counterfeit bill, need not be returned. Brewster v. Burnett, 125 Mass. 68; Kent v. Bornstein, 12 Allen, 342; Snow v. Alley, 144 Mass. 546, 551, 11 N. E. Rep. 764; Reed v. Machine Co., 141 Mass. 454, 5 N. E. Rep. 852. But the check in the present case was not of that character. If, upon its presentation, payment had been refused, the plaintiff would have had no right to retain possession of it, and such retention against the defendant's will would have been a conversion; and if, after a payment had been made through inadvertence or mistake, the plaintiff sought to enforce a return of the money, it was its duty first to tender the check to the defendant. It would be of use to him, and he was entitled to have it before returning the money. The case of Evans v. Gale, 21 N. H. 240, is much in point, and the doctrine of this decision was affirmed in Cook v. Gilman, 34 N. H. 556. The same doctrine is implied in Coolidge v. Brigham, 1 Metc. (Mass.) 547, 550; Merchants' Nat. Bank v. National Eagle Bank, 101 Mass. 281, 285; Estabrook v. Swett, 116 Mass. 303; Bassett v. Brown, 105 Mass. 551, 558. See, also, Otisfield v. Mayberry, 63 Me. 197; Park v. McDaniel, 37 Vt. 594."

CRIMINAL LAW — FORMER CONVICTION—IDENTITY OF OFFENSES.—The Court of Appeals of Kentucky, decides in Commonwealth v. Vaughn, that a conviction under a general law for the offense of selling liquor to a minor without the written consent of his parents is not a bar to a prosecution upon the same facts

for a violation of a local option law in force in the particular county, forbidding the sale of liquor to any person. The court says:

The precise question under consideration was decided by the Supreme Court of Arkansas in Ruble v. State, 10 S. W. Rep. 262. We copy as follows from the opinion in that case: "Appellant sold one pint of ardent spirits to Peter Dees, a minor, without the consent of his parents or guardian. For doing so he was indicted for and convicted of selling liquor without license, and fined in the sum of two hundred dollars, and was indicted for selling alcoholic, ardent, and vinous liquors and intoxicating spirits to a minor without the written consent of his parents or guardian. After he was convicted under the first indictment, he pleaded such conviction and not guilty to the second indictment, and was convicted of the offense therein charged, and fined. Were the trial and conviction under the second indictment lawful? It is some times difficult to determine whether the offense for which an accused party stands charged is the same offense of which he has been before acquitted or convicted, and this is the only inquiry in this case. Mr. Justice Blackstone says: 'It is to be observed that the pleas of *autrefois acquit* and *autrefois convict* must be upon a prosecution for the same identical act and crime.' 4 Bl. Comm. 336. In Com. v. Roby, 12 Pick. 496, Chief Justice Shaw, in delivering the opinion of the court as to what is necessary to constitute offenses charged in two indictments the same, said: 'It must, therefore, appear to depend upon facts so combined and charged as to constitute the same legal offense or crime. It is obvious, therefore, that there may be great similarity in the facts where there is a substantial legal difference in the nature of the crimes; and, on the contrary, there may be a considerable diversity of circumstances where the legal character of the offense is the same, as where most of the facts are identical, but by adding, withdrawing, or changing some one fact the nature of the crime is changed, as where one burglary is charged as a burglarious breaking and stealing certain goods, and another as a burglarious breaking with an intent to steal. These are distinct offenses. Rex v. Vandercomb, 2 Leach, 716. So, on the other hand, where there is a diversity of circumstances, such as time and place, where time and place are not necessary ingredients in the crime, still the offenses are to be regarded as the same. In considering the identity of the offense, it must appear by the plea that the offense charged in both cases was the same in law and in fact. The plea will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact; as, if one is charged as accessory before the fact, and acquitted, this is no bar to an indictment against him as principal. But it is not necessary that the charge in the two indictments should be precisely the same. It is sufficient if an acquittal from the offense charged in the first indictment virtually includes an acquittal from that set forth in the second, however they may differ in degree. Thus an acquittal on an indictment for murder will be a good bar to an indictment for manslaughter; and, *a converso*, an acquittal on an indictment for manslaughter will be a bar to a prosecution for murder. For, in the first instance, had the defendant been guilty, not of murder, but of manslaughter, he would have been found guilty of the latter offense on that indictment; and, in the second instance, since the defendant is not guilty of manslaughter, he cannot be guilty of manslaughter under circumstances of aggravation which enlarge it into murder.' Chitty, in speaking of the identity of the offense necessary to sustain a plea of former acquittal or conviction, says: 'As to the identity of the offense, if the crimes charged in the former and present prosecution are so distinct that evidence of the one will not support the other, it is inconsistent with reason, as it is repugnant to he rules of law, to say that the offenses are so far the same that an acquittal of the one will be a bar to the prosecution for the other.' * * * Tested by the authorities cited and quoted from, was appellant twice indicted for the same offense? The sale of ardent or spirituous liquor within and of itself is no offense. Whether it be criminal or not depends on other facts. One statute make it an offense to sell it without license, and another makes it an offense to sell it to a minor without the consent of his parent or guardian. The object of the two statutes are entirely different. The object of the first is the enforcement of the law which requires licenses to be granted, and fees therefor to be paid; and the other to protect the morals of minors, and prevent them from being led into intemperance. The act or circumstances which makes the sale illegal in one case is entirely different from the facts which make it an offense in the other. Under the first statute he was guilty if he had no license, although he sold to a minor with the written consent of his parent or guardian; and under the other he was guilty if he sold to a minor without the written consent of his parent or guardian, although he had or had not license. The acts necessary to constitute the offenses are so wholly unconnected and distinct as not to be comprehended the one within the other. The essential and constituent elements of the same are different. A party may be guilty of the one and innocent of the other, or guilty of both; and the acquittal of one is not an acquittal of the other. They are separate and distinct offenses. In holding that the two offenses charged against appellant are not the same, we are not without precedents. In South Carolina two statutes were in force at the same time. One imposed a penalty of fifty pounds on persons retailing liquors without license to persons of any description, and the other a penalty of $1,000 and imprisonment on those trading with a negro without a ticket. In State v. Sonnerkalb, 2 Nott. & M. 280, it was held that a person who sold liquor to a negro without license and a ticket was lawfully convicted under these statutes of two offenses, and subject to the penalties imposed by both. In State v. Taylor, 2 Bailey, 49, the same court held that the act of buying goods of a negro, knowing them to be stolen, subjected the purchaser to two punishments,—one for trading with a negro without a ticket, and the other for receiving stolen goods. And it was adjudged in State v. Inness, 53 Me. 536, that 'to punish a person for keeping a drinking house and tippling shop, and also for being a common seller of intoxicating liquors, although the same illegal acts contributed to make up each offense, is not a violation of the law which forbids a prisoner to be put in jeopardy twice for the same offense.' In Com. v. Harrison, 11 Gray, 308, it was held that a conviction for an illegal sale of intoxicating liquor is no bar to a subsequent charge of keeping open a shop for the transaction of business on the Lord's day, although the business transacted was the sale of liquor, for which the party had been previously convicted. And in State v. Faulkner (La.), 2 South. Rep. 539, it was held that the accused, who, being intrusted with cotton for a particular purpose by the owner, obtained money

on it from a third person, by falsely representing himself as the owner, and selling it to him, was lawfully indicted for embezzling the cotton, and for obtaining the third person's money under false pretenses, and that the conviction of the latter offense was no bar to a prosecution for the other."

INSURANCE MONEY COLLECTED BY LIFE TENANT—RIGHTS OF REMAINDER-MAN.—The decisions of the courts of the different States are not in accord as to the relation a life tenant bears to the real property which may be insured, so far as the remainder-men are concerned. All admit that, if the will or deed which creates the life estate requires a policy of insurance to be effected by the life tenant, the proceeds of such insurance should be used in rebuilding the property destroyed by fire, or put at interest, and that in the latter event all the interest earned is the property of the life tenant, as long as such tenancy lasts, and after that the fund is paid over to the remainder-men. But in those instances when the will or deed creating the life estate is silent as to insurance, and the life tenant insures the property, the courts of some of the States decide that the proceeds of such a policy may be received by the life tenant as her own property in fee. The Supreme Court of South Carolina has recently held to the contrary in Green v. Green, 27 S. E. Rep. 952, to the effect that where a life tenant of land with a building thereon insures the building in his own name, the money collected by him from the insurer on a total loss should be used in rebuilding, or should go to the remainderman, reserving the interest for life for the life tenant. The court said in part:

Our own State, along with others, holds the doctrine that a life tenant holds the relation of an implied or *quasi* trustee to the remainder men, and that any proceeds of a fire policy are subject to the laws regulating trusts. Clyburn v. Reynolds, 31 S. Car. 118, 9 S. E. Rep. 973. The case just cited evidently impressed appellants as an obstacle in their path. Hence they first seek to differentiate their case from Clyburn v. Reynolds, *supra*, and, failing in that, they ask this court to overrule that case as wrong in principle. Looking to the differentiation of the one case from the other, it is proper that I should briefly state what was decided in Clyburn v. Reynolds, *supra*. It seems that James Chestnut, Jr., was both the life tenant in the tract of land known as "Sandy Hill Plantation," and also executor of the will under which he derived his life estate in that plantation. For several years he carried a policy of insurance against fire on the dwelling home situate on said plantation. Being in feeble health, he renewed the policy in his name as executor. It was not certain whether he had intended to have himself named as beneficiary of the policy in his own name, or in his name as executor. The dwelling house was burned just before his death, and the proceeds of the policy were paid, which proceeds were claimed by his personal representative, on the one hand, and the remainder-men, on the other. This court decided that it was unimportant whether he intended the policy to be taken in his own name, or as executor of his father's will, and held that, in case of the total destruction of the insured property, the fund from the insurance policy thereon is substituted for the property, and the life tenant will be entitled to the interest for life, and the fund after life tenant's death will be payable to the remainder-men (citing Haxall's Ex'rs v. Shippen, 10 Leigh, 536; Graham v. Roberts, 8 Ired. Eq. 99). This court then proceeds to say: "In the case of Annely v. De Saussure, 26 S. Car. 505, 2 S. E. Rep. 490, an insurance policy taken out by one tenant in common was held not to inure to the benefit of the cotenant. One tenant in common is not in any sense a trustee for his cotenant, and has no insurable interest in his share of the property. A life tenant, on the other hand, is a trustee for the remainder-men, and is certainly liable for loss by fire caused by his negligence. He ought not to be allowed to put himself in a position in which he would have no motive for proper care of the estate, by having a policy of fire insurance, by which, in case of loss, he could substitute the full fee simple value of the buildings in place of his interest for life. We, therefore, think that a sound public policy requires that any money collected by a life tenant on a total loss by fire should be used in rebuilding, or should go to the remainder-men, reserving the interest for life for the life tenant. We quote, as appropriate, the language from 4 Wait, Act. & Def., 22, in reference to insurance beyond the value of the interest of the insured: 'And when the insurance is beyond the value of the interest at stake, the effect is the same; for, although the amount of the loss only can be properly recovered, there will be a hope of getting more.' It would be in the nature of 'gambling.' In accord with these views is the case of Parry v. Ashley, 3 Sim. 97; and our own case of Paper Co. v. Langley, 23 S. Car. 129; in which the court uses these words: 'If • • • the defendants stood in the relation of *quasi* trustees towards the plaintiffs, then the money received by them for the insurance on the house of the plaintiffs belonged *ex æquo et bono* to the plaintiffs.'" The language used in this decision is plain and unmistakable. Evidently the judgment of the supreme court is bottomed upon the idea that the life tenant is an implied or *quasi* trustee for the remainder-men. Once you admit this trust relation between the life tenant and the remainder-men, then the conclusion is inevitable that the life tenant cannot protect her own interest and disregard those of her *quasi cestuis que trustent*. Strongly the court depends upon an opposite course being against a sound public policy. Once admit that a life tenant can claim as her own an insurance for the full value of the dwelling house in case the same shall be destroyed by fire, the rights of the remainder-men will be jeopardized. We have given days to the study of this case, and after that study I am forced to say that, notwithstanding the evident hardship to this very remarkable lady in the management of business requiring sagacity and patience as well as great faith in the future of her native city, I have been unable to see how the decision of Clyburn v. Reynolds, *supra*, could be differentiated from the case at bar. Nor am I able to see why such a wise rule as is established by the decision in Clyburn v. Reynolds, *supra*, should be overridden or modified. It is true, some of the earlier cases do seem to limit

the doctrine of *quasi* trustee in a life tenant for the remainder-men to perishable property, but as years advance the courts are gradually brought to the view that such a relation subsists between them in the case of life insurance; and I cannot say that reflection and a careful study of the authorities and arguments have changed my opinion that Clyburn v. Reynolds, *supra*, embodies sound law.

SEIZURE OF FIXTURES UNDER JUDICIAL PROCESS.

A sues B in *assumpsit*, and in furtherance of his action procures a writ of attachment to be levied on a cotton gin as the property of B, but this cotton gin is located on the land of C and claimed by C as a fixture, and, consequently, as part and parcel of his, C's, realty. Now cotton gins placed on plantations for the purpose of ginning cotton are universally held to be fixtures, and to pass with the land. But cotton gins are portable, easily carried from one place to another, and can be very easily levied on under a writ of attachment and removed from land where they had been placed for use. What, under the facts stated, is C, who claims the cotton gin as a fixture, to do? As we have stated, a cotton gin placed on land for the purpose of ginning cotton becomes a fixture.[1] If C does not take some action his cotton gin will be sold, removed from his land, and pass into the hands of others. It is certain that C cannot bring replevin, detinue or any action which is usually brought to recover personal property in specie, for the one reason, if no other, that the cotton gin under the facts is not personal property. And whilst the statutory intervention by the claimant's issue gets around the objection of the property being *in custodia legis*—still you can no more file a claimant's issue for real estate, than you can bring detinue or replevin for real estate.[2] Then, if there are no forms of action calculated to afford relief under the facts, and the property, being in the custody of the law by virtue of the levy of a writ of attachment thereon, prevents the resort to such forms of action, were they, the forms of action, otherwise adopted and applicable to the facts, and the statutory remedy of intervening in the suit by means of the claimant's issue, being refused because the subject-matter of the suit is realty, and not personalty, such being the facts, we are forced to the conclusion that there exists at law no remedy by which the property can be recovered in specie, that is, by which the particular cotton gin can be restored to C, who claims the same as having become a fixture, and being, therefore, a part and parcel of his realty.[3] It is claimed that this reasoning savors too much of making important rights of property and useful and apt legal remedies subordinate to mere technicalities and quibbles of the law. It is said that the gin is as much a cotton gin as it ever was; is as readily portable, and can as easily be taken by an officer under a writ of replevin or other writ of seizure as it ever could, and that it is far more expeditious and much less expensive to all parties concerned, that the question of fixture *vel non*—be determined by C's simply intervening in the suit between A and B by means of the claimant's issue. But C could not file a claimant's issue in the suit between A and B without admitting that the cotton gin was personal property, that is, for C to file the claimant's issue in the suit between A and B would be for C to declare that the cotton gin was personal property, because only personal property can be recovered by the claimant's issue.[4] Should C once admit that the cotton gin, under the facts, was personal property, he would be without a *locus standi* in court, since his only claim to the gin is based on the fact that the same had become and was a fixture and so part and parcel of the realty. So, then, there being no remedy at law whereby C, under the facts stated, can recover the property in question in specie, that is, can recover it as a cotton gin, he must, so far as the legal remedy in that form is concerned, suffer his property to be sold under the attachment writ or execution in the suit between A and B.[5] Where there is an injury to matter affixed to the freehold, the law considers the injury as done to or suffered by the realty, and pays no regard to the thing itself; that is, the fixture, which may be removed from the land, is not

[1] McKenna v. Hammond, 3 Hill Law, 331; Richardson v. Bordin, 47 Miss. 71, 30 Am. Dec. 366.

[2] Niblet v. Smith, 4 T. R. 504; Chitty on Pleading, vol. 1, p. 119.

[3] Cooley on Torts, p. 205; Hilliard on Torts, p. 67; Chitty on Pleading, vol. 1, p. 159; Fletcher v. Wilkins, 5 East, 283.

[4] Freeman on Executions, p. 65; Chitty on Pld. (13th Ed.) p. 413.

[5] Chitty on Pld. vol. 1 (Ed.), p. 304; Brown v. Mitchell, 102 N. C. 349; Faulcon v. Johnston, Am. St. Rep. 11.

further considered by the law, beyond an item of evidence to be considered by the jury in estimating the damage to the realty; there is no form of law by which the removed fixture can be recovered, and the settled principles of law prohibit any suit or action for the fixture without, at the same time suing for and recovering the land to which the chattel has become affixed.[6]

The law considers the detachment and asportation of the chattel which has become a fixture, in no other light than that of an injury to the land. And although the fixture may be of that class which can be easily detached from the land, and of a useful nature, so that the same may be carried from one place and set up and used at another place, and consequently may be liable to, and may be seized or levied on by writs of execution, attachment or other process, as could have been done, and was done, in the case supposed at the beginning of this article, yet, nevertheless, the chattel, by becoming a fixture, has forever lost its character as a chattel, and though it may subsequently be detached from the land, it is not thereby restored to its former state as a chattel, and as a consequence no action for the recovery of personal property in specie, as detinue or replevin, can be resorted to for recovering the property as a chattel. Neither, in case it is levied on by writs of execution or attachment, can the owner of the land interpose in a suit between third parties, and claim the property by means of the claimant's issue;[7] but he can only recover for the injury to the land. There is, however, one phase of the case wherein the rigid rule of law is relaxed, and the fixture, when detached from the realty, is considered as *qutsi* personal property; that is, there is a class of cases in which the fixture, when detached from the land, is regarded as personal property *sub modo*. But this relaxation of the law is never carried to that extent of allowing an action to be brought for the recovery of the fixture itself. There are cases, and the rule is general, that when trees have been severed from the realty, or roots or herbs have been dug from the earth, and afterwards some third party carries them away, here trespass *de bonis asportatis* may be brought and damages recovered as for the asportation of personal property, and the action of trover is generally brought in such cases. Now, the bringing of the action of trover in such cases, shows that the detached chattel is considered as personal property. For it is a well-known principle of law, that the judgment in trover operates a sale or transfer of the property sued for to the defendant, whilst the damages assessed by the verdict of the jury is the price allowed the plaintiff for his property.[8] If, then, the law will consider the chattel, when severed from the freehold, as personal property to the extent of authorizing the recovery of compensatory damages for its conversion,[9] why not consider it as personal property to the extent of allowing an action to be brought for the recovery of the identical property itself? The old common-law lawyers much considered this subject in their contentions over the statute of 4 Edw. III., ch. 7. Prior to this statute, the universal rule of law had been that *actio personalis moritur cumpersona*. But this statute, after reciting "that in times past executors have not had actions for a trespass done to their testators, as of the goods and chattels of the same testators carried away in their life, and so such trespassers have hitherto remained unpunished, provided 'that the executors, in such cases, shall have action against the trespassers and recover their damages in like manner as they whose executors they be should have had if they were in life.'" Under this statute it was held that whilst the executors could not allege and say *quare clausum fregit*, etc., that is, could not sue for an injury to the realty, and could not even say *quare clausum fregit et blada asportavit;* that is, could not say that the trespasser

[6] Schouler's Personal Property, pt. 2, § 113; 2 Smith's Leading Cases, p. 241; Burk v. Baxton, 3 Mo. p. 207; Blethen v. Towle, 40 Me. p. 310; Bainway v. Cobb, 99 Mass. 457; Wall v. Hinds, 4 Gray, 256; Stockwell v. Campbell, 39 Conn. 362; Thielman v. Carr, 75 Ill. 385; Richardson v. Borden, 42 Miss. 71; Smith v. Odorn, 63 Ga. 499; Lapham v. Norton, 71 Me. 83; Dobschentz v. Holliday, 82 Ill. 371.

[7] Freeman on Executions, p. 312.

[8] Toule v. Lovett, 6 Mass. 394; Arnold v. Jeffreyson, 2 Salk. 654; Goggesley v. Cuthbert, 2 Nev. Rep. 170; Clowes v. Hawley, 12 Johns. Rep. 484; Murray v. Burling 10 Johns. Rep. 172; Benjamin v. Bank of England, 3 Camb. 419; Yea v. Field, 2 Term Rep. 708.

[9] Of course, I speak here of compensatory damages. Punitive damages are not awarded on any such principle. But compensatory damages, in such cases, is the price paid by defendant to plaintiff for plaintiff's property, which defendant has converted and appropriated to his use.

broke into the close and carried away or cut and carried away trees, etc., there growing, yet, that when trees, corn, hay, etc., had been cut and left laying on the land, then the executor could sue any one who should enter on the land and carry the same away. This was first and finally settled in the great and leading case of Emerson v. Emerson, 1 Ventr. 187, and in 2 Keb. 874. Now trees, etc., growing on the land are a part of the land. Fixtures are a part of the land, and if these things when severed from the land become personal property so far as to allow of personal actions to recover damages for their conversion, why not also allow of personal actions to recover the property in specie, the property itself? This question is one of considerable practical importance. We know that this subject of fixtures, as to the fixture becoming a part of the land, is altogether a *fictio juris*, that there are many fixtures which can be readily and easily detached from the land, and which the owner wishes to make use of not as real estate, but as a mill or gin. Not only this, but there are cases, where it is of the highest importance to the owner, that he be allowed, in case his mill or gin is levied on or attached, to replevy the same, or file the claimant's issue and bond it, so that he may continue his milling or ginning, as where he "runs" a public gin—in such cases to deny to the owner the right to recover possession of his gin or mill itself. To say to him, you can only recover damages for the trespass on your realty, which would necessarily be small, because the loss of profits, or customers by the gin or mill being stopped, could not be recovered in an action for a trespass on the land,[10] to thus deal out the law to him would be a practical denial of the maxim, *ibi injuria, ubi jus remedium*. The owner may be running a public gin. His may be the only gin for miles around in a backwood's settlement, and for him to be unable to bond the property, by filing the claimant's issue and making bond, in case the mill or gin was levied on under process, might be such an injury, that the small sum awarded for the trespass on the realty would be practically no compensation. And, again, the fixture might be of such a nature or the circumstances might be such, that a kind of *pretium affectionis* would be connected with the fixture, and the man ought to be given his own, his very identical and same property. The conclusion of the whole matter is, that there are certain[11] fixtures which can be detached readily from the realty, and being such are liable to be levied on under writs of execution or attachment, and in such cases the owner should be allowed to recover or retain possession of such fixture, either by filing the claimant's issue and bonding the same, or by some other proceeding which would enable him to recover or retain possession of the fixture itself, that is, the law should furnish him with a remedy by which he could retain or recover possession of the property, and hold the same until the determination of the right of property by the court.

From the conservative nature of the Anglo-Saxon mentality the legal right exists long before the remedy, and it is only through the urgency of this right that the legal remedy is brought forth. Thus, prior to the statute of Westminster 2d, the old forms of action then in existence were found inadequate to the needs of an advancing civilization, and there being no remedies adapted to these new rights, the profession by common consent resorted to writs adapted to the facts of each case; these new writs were called magistralia. But doubts arising as to the legality of these new writs, parliament legalized them by the statute known as Westminster 2d. Thus it was that the action of *assumpsit*, trover, and the other actions of "trespass on the case," were brought into existence and use. There are cases, similar in this behalf, to the one under consideration, wherein the common law by a rigid adherence to formality was unable to redress injuries,

[10] Stutz v. Chicago, etc. Ry. Co., 9 Am. St. Rep. 771; Ross v. Liggett, 61 Mich. 445; Alabama, etc. R. R. Co. v. Arnold, 84 Ala. 159; Louisville, etc. R. R. Co. v. Brooks, 83 Ky. 129; Daroh v. Illinois Cent. R. Co., 65 Miss. 14.

[11] This question generally comes up in this State by one man erecting or placing on the property of another, a mill gin or other machinery, without intending that it shall become a fixture, and then being sued by some creditor, the mill gin or machinery being levied on, the owner of the land comes forward and claims that the mill, etc., is a fixture, has become a part of the realty and is not subject or liable to be levied on under any character of process in the case. This was the case, in the case supposed at the begining of this article, in which B and S sued J C & Co., levied on a mill erected by J C & Co., on the land of J. E. Cox. T represented Cox the owner of the land—Cox claimed the mill as a fixture.

and the power of courts of equity have been successfully invoked. Thus, at common law, for injuries to real property, no action in form *ex delicto* could in general be supported against the personal representation of the wrongdoer; but a court of equity would frequently afford relief against the executor of the wrongdoer, though at law the action *moritur cum persona*, and therefore when a tenant for life cut down timber and died, relief was decreed against his executors in favor of the remainder-man. On this principle a court of equity would doubtless afford relief in the class of cases under consideration.[12]

Columbus, Miss. LINTON D. LANDRUM.

[12] Compare v. Hicks *et al.*, 7 T. R. 732; Chitty's Pleading, Vol. 1, p. 83.

INJUNCTION LAW—RIVALS IN BUSINESS—ADVERTISING.

SCHRADSKY v. APPEL CLOTHING CO.

Colorado Court of Appeals, October 11, 1897.

Where it appeared that, after the purchase of a stock of goods of a certain bankrupt firm by plaintiff, defendant, who was engaged in the same business in the same city, advertised that he had purchased goods which had been manufactured for such bankrupt firm, which fact there was testimony to support, and it also appeared that plaintiff had, in its advertisements, grossly misrepresented the value of the stock so purchased by it, the facts were insufficient to justify interference by injunction to restrain defendant from so advertising, on the alleged ground that the public would be misled and deceived thereby.

WILSON, J.: The parties to this suit were each engaged in the general clothing and gents' furnishing goods business in the city of Denver. In October, 1894, appellee, who was plaintiff in the trial court, purchased from the mortgagees a stock of goods of a bankrupt firm, Garson, Kerngood & Co., which had been engaged in a like business in the same city. In a few days thereafter, plaintiff commenced this suit, alleging that the defendant, by means of advertising in the press, and by placards displayed in the windows of his store and paraded through the streets, was misleading and deceiving the public, by tending to induce the belief that he had purchased this bankrupt stock, and praying for an injunction to restrain such acts. A temporary injunction, as prayed for, was issued without notice. Defendant answered, setting up that he had purchased goods which had been manufactured for Garson, Kerngood & Co., upon their order, some of which had been shipped to them, but not received, and some portion had not been shipped at all, on account of the failing credit of the firm. He alleged that he was simply advertising these goods as having been ordered by, and manufactured for, said bankrupt firm, and denied that he was claiming or advertising in such a manner as to induce the belief that he had purchased the stock of the firm on hand in their store in Denver. He also set up affirmatively that the plaintiff was misleading and deceiving the public by materially false statements in its advertisements as to the value of the stock of goods purchased, and the discount price on the cost at which it had been obtained. The answer was under oath. Defendant then filed a motion for a dissolution of the injunction, which was denied. Upon final hearing, judgment and decree were in favor of plaintiff, and the injunction was made perpetual. From this, defendant appealed to this court.

In any view which we take of this case as presented by the record, we cannot see how it shows a state of facts which would justify the court in the affirmance of the judgment. We cannot approve a practice, nor subscribe to a doctrine, which permits the exercise by courts of the extraordinary power of injunctive relief for every wrong or infringement upon the rights of another. Such a course of procedure, if carried to its ultimate natural conclusion, would tend to entirely subvert the fundamental principles upon which our system of laws is founded. Injunction has been properly styled the strong arm of equity, to be used only to prevent irreparable injury to him who seeks its aid. It has never been found possible to lay down any exact rule regulating or controlling the exercise of this power by the courts, but it is an extraordinary power, and there is a universal consensus of authority, both in England and America, that it should be used only with the most extreme care and caution. Its abuse would serve not only to render the law absolutely uncertain, by substituting for its established principles the varying opinions of judges differing in temperament, education, knowledge, and disposition, but would, in the end, induce far more grievous wrongs than those it was intended to prevent. It is, as a remedy, more flexible and adjustable to circumstances than any other legal process, and it is true that the last few decades have brought about greatly changed conditions in society and business. In consequence, there have been necessitated, to meet these altered conditions, some modifications in, and relaxations of, the rules formerly applicable to the law of injunction. In doing this, however, it is a mistake to assume that all of the old principles underlying it have been abandoned, and that all of the old landmarks have been destroyed. The rigid, narrow, and unpliant construction of the word "irreparable," which formerly prevailed, has long since given way, even where no statute expressly requires it, to an enlarged and more liberal interpretation, in accord with the more advanced requirements of the times, with the more enlightened spirit of the age, and with the increased necessities of

trade and commerce. It still remains true, however, that before this remedy can properly be invoked, it must clearly appear that the threatened injury is one of a serious character.

It by no means follows that a writ of injunction should issue, restraining the commission of an act, simply because that act would be an infringement upon the rights of, and cause damage to, another. It is true that this frequently offers a seductive and expeditious method of making a temporary, at least, disposition of an unpleasant emergency, if a kindly disposed judge can be found; but the final consequences do not always tend to inspire increased respect for the law, nor encourage its stricter observance. Nor should it always issue, even though the menaced damage might be serious. It is true that it is not required, as a condition precedent, that an applicant for the issuance of this writ should be wholly without remedy at law; but it is still conceded that, as a general proposition, the writ will not issue if it appears that the applicant has an adequate remedy at law. The rule also still remains in force that he who seeks an injunction must come into court with clean hands and a clear conscience. The charge that defendant, in his advertisements or placards, claimed to have been the purchaser of the stock of goods, was not sustained by the evidence. He did claim to have bought and have on sale goods manufactured for Garson, Kerngood & Co., and this he had an equal right with plaintiff to do, as there was testimony to support the pretension, and as plaintiff had purchased only the stock on hand in the Denver store.

The attempt to show that in the printed matter undue prominence was given to the words "Garson, Kerngood & Co.," and that the words "manufactured for" were too inconspicuous, was also a failure, so far as we can judge from the exhibits attached to the record. It would, in any event, be imposing too heavy a burden upon an appellate court, in ordinary cases, to require it to measure the type in which rival tradesmen proclaim the virtues of their wares, and it would be still more difficult for the court to determine what particular word, line, or sentence of a printed poster would be most likely to attract the public eye, and impress itself upon the public mind. The public eye is too varying and uncertain, and its mental impressions are not measured or controlled by any fixed rule of which we have knowledge, or to which we have been cited.

According to the plaintiff's complaint, the damage which it anticipated was that the public would be misled and deceived by the alleged false publications of defendant, and this was set up as the ground upon which it prayed an injunction. Even if this be true, the plaintiff itself was not entirely guiltless in this respect, and did not come into court with clean hands. It advertised in the public press that the purchased stock was of the value of $136,451.28, and that it had been bought by it at 42 cents on the dollar. This would have made the purchase price over $57,000, whereas the evidence showed that the sum actually paid was only $31,000, and the testimony of a competent and disinterested witness placed the value of the whole stock when new at not to exceed $50,000. If the injunctive power of the court should have been invoked to prevent the public from being deceived about this transaction, surely the plaintiff should not have escaped. In this regard, the case, although not exactly parallel as to its facts, comes clearly within the principles so well expressed by our Supreme Court in Cigar Co. v. Pozo, 16 Colo. 397, 26 Pac. Rep. 556.

We by no means hold that in no case should a court interfere by injunction to prevent a tradesman being unwarrantably deprived of the benefits which he could reasonably anticipate as a reward for his enterprise in the legitimate advertisement of his business. Such a case might arise, but even then it should be carefully scrutinized, to the end that the court be not made simply an instrument to enable one tradesman to secure an unfair and unconscionable advantage over a rival in business. We do say, however, that the facts in this case, as gleaned from the record, are not sufficient to justify such an interference. The damage, if any could be expected, was entirely too doubtful, speculative, and remote. The threatened injury, if there was one, was neither so imminent nor so great that there was not a complete and adequate remedy at law, and the conduct of plaintiff itself was not of such a character as to give it high standing in a court of equity.

For the reasons given, the judgment and decree will be reversed, and the cause remanded to the trial court, with instructions to dissolve the injunction and dismiss the bill. Reversed.

NOTE.—The purposes for which an injunction will be granted are very numerous. Among them may be mentioned the restraining an infringement of a patent, copyright or trade-mark (Schneider v. Missouri Glass Co., 36 Fed. Rep. 582; Singer Sewing Machine Co. v. Wilson Sewing Machine Co., 38 Fed. Rep. 586; Schneider v. Williams, 44 N. J. Eq. 391), the prevention or continuance of a public or private nuisance (Cumberland Valley Railroad Co.'s Appeal, 62 Pa. St. 227; Bigelow v. Hartford Bridge Co., 14 Conn. 565), the restraining the transfer or issuing of stock in a corporation (Osborn v. Bank, 9 Wheat. 738), the restraining the doing of unauthorized acts by a copartner of a corporation (Dodge v. Woolsey, 18 How. 331; Kean v. Johnson, 9 N. J. Eq. 401), the restraining the disclosure of confidential communications, secrets or papers (Salomon v. Hertz), 40 N. J. Eq. 400; Arthur v. Oakes, 11 C. C. A. 20; *In re* Debs, 15 S. C. Rep. 900, 158 U. S. 564. And see also Barrett v. Mt. Greenwood Cemetery Assn. [Ill.], 42 N. E. Rep. 891; Hamilton-Brown Shoe Co. v. Saxey, 32 S. W. Rep. 1106), the restraining the removal of property or the evidences of indebtedness or of title to property out of the jurisdiction of the court, and also the commission of waste (Livingston v. Gibbons, 4 Johns. Ch. 571; Osborn v. Bank, 9 Wheat. 738), the restraining of the transfer of property or the parting with possession of such property. Malcolm v. Miller, 6 How. Pr. 456. An injunction will be granted only when there is no other

adequate remedy or where there is an urgent necessity of restraining the commission of the threatened act or where it is made to appear that irreparable injury will be otherwise sustained by the plaintiff. 7 Lawson's Rights, Remedies & Practice, 5769, and cases cited. An injunction can be obtained only for the protection of civil and private rights and will not be issued for the prevention of criminal or immoral acts (Gault v. Wallis, 53 Ga. 675; Joseph v. Burke, 46 Ind. 59; Burnett v. Craig, 30 Ala. 135; Moses v. Mayor, 52 Ala. 198; Sparkawk v. Railroad Co., 54 Pa. St. 401), though in some recent prominent cases the writ of injunction was thus successfully used.

The following recent cases afford examples of the use of injunctive relief as to private rights: S sold out his business of manufacturing, plant, good will, etc., to a company bearing his name, for stock therein, then sold out his stock, and again went into business. The company soon thereafter ceased to manufacture, sold part of its plant, and did no business except to turn over to other manufacturers, for a commission, such orders as happened to come in. Held, that an action would not lie to restrain S from doing business on his own account, and advertising the company as having gone out of business. Shonk v. Shonk Tin Print. Co., 37 Ill. App. 20. Injunction will lie to restrain former confidential employees, and others engaged with them, from divulging or using trade secrets or inventions, which were imparted to or invented by such employees in the course of their employment, where they had agreed to assign to their employer all the improvements which the might make in the line of his business while they were in his employ. Eastman Co. v. Reichenback (Sup.), 20 N. Y. S. 110. Injunction will lie against the publication of a picture of plaintiff in defendant's newspaper, with an invitation to readers of the paper to vote on the question of the popularity of plaintiff as compared with another person, whose picture is also published in such paper. Marks v. Jaffa (Super. N. Y.), 26 N. Y. S. 908, 6 Misc. Rep. 290. A court of equity should restrain by injunction the publication of a picture of a deceased member of complainant's family, taken from a photograph and portrait of deceased, where respondent has not observed the conditions on which the portrait and photograph were obtained. Corliss v. E. W. Walker Co. (C. C.), 57 Fed. Rep. 434. A court of equity, at the instance of one of the relatives of a deceased person, will enjoin the making and placing on public exhibition of a statue of the decedent by unauthorized persons, which plaintiff and all other relatives unite in alleging will cause them pain and distress, and will be considered by them a disgrace; and this, whether or not, in the opinion of the court, the proposed representation should produce the alleged effect. Schuyler v. Curtis (Sup.), 24 N. Y. 509, 30 Abb. N. C. 376. Plaintiff employed defendant in the manufacture of certain oils and greases. Before defendant entered such employment, he agreed not to divulge or use any secrets of the business plaintiff might make known to him. Subsequently, he left plaintiff's employ, and began the manufacture of similar oils and greases, using plaintiff's secrets therein. Held, that a permanent injunction was properly issued to restrain him from so doing. Fralich v. Despar, 30 Atl. Rep. 521, 165 Pa. St. 24. Though a private individual may enjoin the publication of his portrait, a public character cannot, in the absence of breach of contract or violation of confidence in securing the photograph from which the publication is made. Corliss v. E. W. Walker Co. (C. C.), 64 Fed. Rep. 280. An owner of a process or invention for manufacturing an article, which was kept secret from all but confidential employees, may restrain former employees from disclosing, or using in a rival establishment, their knowledge thereof, acquired while occupying such confidential relation; and it is immaterial that there was no written contract between them, or that, at the commencement of the employment, the employees were minors, and performed comparatively unimportant duties. Little v. Gallus, 38 N. Y. S. 487, 4 App. Div. 569. The good faith which exists between an employer and those in his employ renders it illegal, even in the absence of any stipulation, to make use after the termination of the employment of any materials or any information acquired by them while they were in that confidential relationship; and the court will grant an injunction to restrain such use, in addition to awarding damages. Louis v. Smellie, 73 Law T. 226. The execution of a costly bust of a deceased person, and exhibition thereof in the rooms of an association of which deceased was the founder, without the consent of her relatives, will not be enjoined at their instance on the grounds that the persons getting up the proposed staute were not friends of deceased; that, in the circulars requesting subscriptions for the staute, deceased was by mistake represented to have been the promoter of a patriotic movement; that, because of deceased's sensitive character, such public notoriety would have been unpleasant to her during life; that the bust will not be a likeness of the deceased; and that deceased did not sympathize with a woman's rights reformer of whom a bust was also to be made and exhibited,—as such facts show no ground for mental distress of the relatives. Schuyler v. Curtis, 42 N. E. Rep. 22, 147 N. Y. 434.

JETSAM AND FLOTSAM

BOYCOTT AGAINST LABOR-SAVING MACHINE.

We are aware of the risk always taken in basing discussion of a legal decision upon mere newspaper versions of its substance, without waiting for a copy of the opinion. Nevertheless, the recent decision of the U. S. Circuit Court of Appeals in the Eighth Circuit, in Oxley Stave Co. of Kansas City v. Members of the Coopers' Union and the Trades' Assembly of that place, has attracted wide popular attention, and it seems proper to venture upon some words of comment founded upon the press reports, which have the appearance of being fairly accurate and adequate. The suit seems to have been for an injunction to prevent the defendants from conspiring to carry out a boycott against the plaintiff for the purpose of compelling the latter to withdraw from use a newly invented machine for hooping barrels. Judges Sanborne and Thayer very naturally decide that the action of the defendants was illegal, and that the injunction would lie. The surprising feature of the case is that Judge Caldwell dissents.

We have no knowledge of the particular form of the present boycott, but the general law on the subject is quite well settled. Toleration by the courts of the boycott principle would always be *pro tanto* giving countenance to anarchy. Courts have now with practical unanimity recognized the right of employees to strike, and to take any peaceable concerted measures against their present or former employers, to procure an increase of wages or the redress of any grievance. The gist of a boycott, however, is to draw utterly disinterested outsiders into a controversy, for

the sake of compelling a recalcitrant employer to yield, through making life generally miserable, or the transaction of any business impossible. There could of course be no limit in principle to the extension of the circumference of the boycott circle. A dispute between an employer and its employees in one small locality might be made to cripple or demoralize business in remote places, and among persons who had no knowledge of what the original difficulty was about, and had never heard of the original parties.

Under such circumstances it is to be regretted that any federal judge was capable of giving his approval to such an expedient of industrial controversy. So far as can be gathered from the newspaper summary of Judge Caldwell's views, they consist of the conventional diatribe against the evils of trusts and other combinations of capital, with the opinion that it is necessary for conserving the substantial rights of employees to uphold resort to the illogical and publicly oppressive measures in question. It is the duty of the courts to declare the law, and not to lecture on political economy or commiserate with sentimenta grievances. There has been of late far too much stump speaking from the bench. But, overlooking for the moment the mistaken policy of judicial sermons upon popular wrongs, it may not be out of place in a legal periodical, in criticising an *ultra vires* judicial utterance, to indicate the theoretical fallacy as well as the pernicious tendency of the views so expressed. Not only is the method of boycott essentially anarchical, but in the present case it was resorted to, not to increase wages, but to prevent the use of a new machine. There is no doubt that the adoption of new mechanical contrivances furnishes, from time to time, a means of temporarily neutralizing to an extent the power of trade unions. It is therefore not unnatural that short-sighted and ignorant men, who do not realize that the progress of invention ultimately and in the long run benefits laborers themselves, should assume to direct the machinery of their organizations against the introduction of new scientific devices. Of course such efforts must prove as futile as all other attempts to fight the future. But the fact that a union of laborers essayed such a conflict is significant upon the mental calibre of the leaders. We are loath to conclude that the majority of any body of workmen really believed that a movement to suppress an actually efficacious labor-saving appliance could finally triumph. The most serious difficulty in dealing with the labor problem is the fact that representative, democratic government does not prevail among trades unions, but that they are despotically ruled by men without sufficient intelligence for leadership, who are often personally selfish, and who attain their positions through the blatant arts of the demagogue. It would seem that the only effect a judicial opinion, approving of the boycott as a means of fighting the advance of science, could have would be to afford some color of official encouragement to the laboring masses—who, beyond question, have real wrongs to be righted—in persisting in blindly following the leadership of the blind.—*New York Law Journal.*

THE LATEST BOYCOTT CASE.

What appears to be the first decision of a federal court on the subject of the boycott was rendered in the United States Circuit Court of Appeals, sitting in the city of St. Louis, Mo., on the 13th inst. The case is that of the Oxley Stave Company, of Kansas City v. J. S. Hoskins and twelve others. The defendants are all members of Coopers' Union No. 18, of Kansas City, and the Trades' Assembly of the same place. The facts appear to be that in January, 1896, the Stave company placed in their establishment a plant to hoop barrels. This action angered the defendants, who, after requesting the company to withdraw the machines and having their request refused, caused a boycott to be declared against the company. The latter, through their attorneys, secured from the United States District Court an injunction against the defendants restraining them from carrying on the boycott. The defendants appealed to the United States Circuit Court of Appeals, which now affirms the decision of the lower court. In doing so, Judges Sanborn and Thayer held that the defendants had no right to form a conspiracy to deprive the plaintiff of its right to manage its own business, for if such action were lawful, then a combination might be organized for the purpose of preventing the use of type-setting machines, presses, harvesters, threshers and thousands of other useful inventions. In other words, it was held that the boycott is not a legal weapon. The opinions in the case—for the court was divided—will be published in full in these columns as soon as they can be obtained, for we regard the decision as of the highest importance, not alone to labor organizations and corporations, but to the public at large. Judge Caldwell, in a lengthy dissenting opinion, in which he inveighs vigorously against trusts, says: "All capital seeks to increase its power by combination, and to that end assumes the form of corporations and trusts. Many of these combinations are on a gigantic scale. They are the employers of the great mass of laborers. They are formed solely for pecuniary profit. They defy all social restraints that would have a tendency to lessen their dividends. What the stockholders want is more dividends, and the best manager is the man who will make them the largest. The struggle is constant between laborers, whose labor produces the dividend, and those who enjoy them. The manager is tempted to reduce wages to increase dividends and the laborers resist the reduction and demand living wages. Sometimes the struggle reaches the point of open rupture. When it does, the only weapon of defense the laborer can appeal to is the strike or the boycott, or both. These weapons they have an undoubted right to use, so long as they use them in a peaceable and orderly manner. This is the only lawful limitation upon their use. That limitation is fundamental and must be observed. It was observed in the case at bar to its fullest extent."

While the full text of the opinion is not at hand, we cannot refrain from expressing the opinion that the position of Judge Caldwell is untenable, and his reasoning unsound. Perhaps it would be more accurate to say that he is partly right and partly wrong. With respect to the strike as a legitimate weapon, legally used, in the hands of the wage-earner, in resisting proposed reductions of, or in enforcing the payment of higher wages, there can be no doubt that Judge Caldwell is right. Workmen may quit work whenever they see fit, either singly or in groups. As to the boycott, however, the majority opinion of the court, it seems to us, is not only good law, but voices the sentiment of the great majority of the American people. The so-called boycott is an un-American, detestable method of coercing employers which ought not to be recognized as a legal weapon of offense or defense. To thus legalize its use, even in a "peaceable and orderly manner," as Judge Caldwell ingeniously puts it, would be not only inequitable but in the highest degree dangerous to labor as well as to capital and to organized society. If Judge Caldwell's opinion were

to be made the law of the land, it would result in the institution and perpetuation of a system of tyranny the evil consequences of which it would be difficult to overestimate. It would be, indeed, the legalizing of conspiracy to ruin an unpopular employer or bring him to terms. It might be said, on the other side, that every one has an inherent right not only to withhold his patronage from an alleged unfair merchant or employer, but to advise others to do the same, and that this is all that a boycott amounts to. The distinction, however, is easily made. The movement becomes a boycott—and, according to the decision under review, not a legal weapon—when it assumes large proportions through the denouncing and "blacklisting" of the merchant or employer in the newspaper organs of the labor fraternities, or in other ways which it is unnecessary to point out, and in this form it ought never to be allowed to obtain a foothold in this country.—*Albany Law Journal.*

BOOK REVIEWS.

BEACH ON TRUSTS AND TRUSTEES.

The new work of Mr. Beach, on the Law of Trusts and Trustees, will be welcomed by the bench and bar. It impresses us as a timely and as a very important contribution to the literature of the law. The law of trusts, in its rapid development under modern industrial conditions, is constantly becoming more important; and the numerous decisions of recent date, involving many new applications of equitable principles and rules, constitute a very ample justification of a new work on this subject. It is matter of congratulation to the profession that the work has fallen into competent hands. The subject of Trusts and Trustees, recognized as presenting the most subtle, intricate and difficult problems of the law, here receives a full, comprehensive and thorough discussion. The treatment is methodical and exhaustive. All the various forms of trusts receive careful consideration, and the systematic and logical unfolding of the whole subject renders it a very simple matter to turn to any point that may be a subject of investigation. The discussion of Implied Trusts indicates a very thorough and careful study of the whole subject, and it will be found of special interest and value. In the older text books and in many of the decisions of the courts, there is a degree of confusion in the classification and treatment of this branch of Trusts. In this work we have the most logical and satisfactory treatment of the law of Implied Trusts that has come under our observation. There are several chapters that are new and that will be of special service. Of these the chapters on "Trust Companies," and on "Spendthrift Trusts," may be cited as examples. Other chapters contain important additions to the law as expounded by the earlier authorities. The notes are a very important and valuable feature of the work. They represent a vast amount of labor, and the sifting and appropriating of materials have been judicially and wisely done. The notes indicate not only a commendable industry, but as well a sound legal judgment on the part of the compiler. The Table of Cases is quite the most extensive and valuable that has yet appeared in a work on this subject. The number of cases cited is in excess of 16,000, and the different points of many cases, to which attention is directed, increase the number of citations to more than 23,000. The index is unusually complete and valuable. It has been prepared with a large amount of judicious and well directed labor. The style of the writer is admirably adapted to the work of law writing. It is not only chaste and finished but it is also eminently clear, concise, pointed and vigorous. The statements of equitable doctrines indicate a thorough and comprehensive grasp of the subject, and they are presented in language that cannot be misunderstood. The work is the product of a disciplined and judicial mind, and his propositions are models of legal writing. "Beach on Trusts and Trustees," will at once be recognized by the profession as the standard work on this subject, and it must continue to hold its place against all rivals. Subsequent writers will hardly have the patience to submit to the vast amount of labor which has been expended upon this work. In a recent notice of this work, Chief Justice Howard, of the Supreme Court of Indiana, a jurist eminent alike for his legal learning and for his judicial temper, says: "Mr. Charles F. Beach's new work on Trusts and Trustees has impressed me as one of great value. The law upon this subject has developed rapidly within recent years, and we have in this treatise the law as it now is, fortified in the text, and in the full and satisfactory notes, with references to a multitude of recent as well as older decisions of the courts. The treatment of trusts is systematic and complete. The various kinds of trusts are treated in detail and without confusion, so that it is possible to find the law as here stated, with the decisions of the courts, on all classes of trusts. Some of the chapters, as that on spendthrift trusts, are of special interest and value. The style of the writer is admirably clear and pleasing, avoiding both prolixity and obscurity. I have no doubt that the work will meet with the favor which its merits deserve." Published by the Central Law Journal Co. St. Louis.

HUMORS OF THE LAW.

Mr. Newlywed (suspiciously). "Who is that old gent who appears to take such an interest in you?"

Mrs. Newlywed. "Oh, he is only the lawyer who attends to my divorces."—*Texas Sifter.*

They were talking about a female sheriff out west in the Iroquois corridors last night. "I don't see how she can be a success," said the drummer with a horseshoe diamond. "Women haven't physical strength enough." "Easy," replied the man telling the story. "If she goes to arrest a man she tells him she has an attachment for him, and he drops. See?"—*Cleveland Leader.*

County Clerk. "Gentlemen of the jury, have you agreed upon a verdict?"

Foreman. "We have."

Clerk. "What say you—do you find the prisoner at the bar guilty or not guilty?"

Foreman. "We do."

Clerk. "You do? Do what?"

Foreman. "We find the prisoner at the bar guilty or not guilty."

Clerk. "But, gentlemen, you must explain."

Foreman. "Of course; you see, six of us find him guilty and six of us find him not guilty, and we've agreed—to let it stand at that."—*London World.*

One of the most modern grounds of application for divorce was that recently alleged in a proceeding by the husband against the wife, to-wit: "and does compel, the said husband, to periodically fast in compliance with the rules of a certain church of which she is a devout member."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. ADMINISTRATION — Executors—Preservation of Estate.—Where an executor invests estate funds in the preservation of property of the estate, he should be given credit for the money realized out of such property by reason of such preservation, though the court reserve until final accounting the question whether such investments were necessary.—IN RE SMITH'S ESTATE, Cal., 50 Pac. Rep. 701.

2. APPEAL—Laches — Bill of Exceptions.—An appellant in a probate proceeding who delays for six months in applying to the supreme court, under Code Civ. Proc. § 653, for a rule to settle a bill of exceptions which the trial judge is disqualified to settle, abandons his appeal, since the policy of the law requires a speedy settlement of the estates of deceased persons. —IN RE DEPAUX'S ESTATE, Cal., 50 Pac. Rep. 682.

3. APPEAL — Presumptions.—Where the record contains none of the evidence offered on the trial, and no special finding was made upon a material issue in the case, an appellate court will presume that the evidence before the trial court was such as to support the general finding and judgment of the court.—LYSLE V. LINGENFELTER, Kan., 50 Pac. Rep. 503.

4. ATTORNEY AND CLIENT—Authority to Stipulate Decree.—After an action to restrain defendant from interfering with plaintiff's water right had been begun, plaintiff's attorney advised him that defendant had made a proposition to settle. Plaintiff wrote in reply: "We shall be willing to dismiss the suit, so long as we get a satisfactory guaranty from them, or such guaranty as you think necessary. I don't want the case dismissed, and then have the same performance to go through with next, or any, year. Please have it so fixed that we shall have no further trouble:" Held, that the letter did not authorize plaintiff's attorney to stipulate a decree.—JUBILEE PLACER CO. V. HOSSFELD, Mont., 50 Pac. Rep. 717.

5. BANKS AND BANKING — Collection of Draft—Negligence.—Plaintiff gave a bank for collection a draft drawn by a bank in another State upon a bank in a third State. He was told that he must be identified, and he replied that he knew no one there, but that his signature was at the bank drawing the draft. The collecting bank thereupon sent the draft to the drawing bank for identification of the indorsement, and it was there lost: Held, in an action against the collecting bank for negligence, that it was not sufficient to instruct the jury that if the bank, through its negligence, failed to return the draft or its proceeds, a *prima facie* case of negligence was made out, but that the court should instruct the jury as to what facts would constitute negligence.—DAVIS V. FIRST NAT. BANK OF FRESNO, Cal., 50 Pac. Rep. 666.

6. BANKS—Authority of Officer—Estoppel.—When the directors of a bank permit an officer to hold himself out to the public as being invested with absolute power to manage and control its affairs, in such manner and for such length of time as to lead innocent persons to make contracts with him, honestly believing that he has the authority he claims, the bank cannot repudiate such contracts.—COX V. ROBINSON, U. S. C. C. of App., Ninth Circuit, 82 Fed. Rep. 277.

7. BILLS AND NOTES — Consideration.—Defendant received, in trust for a national bank, stock in another bank, executing his note for the same at its par value, in order that the books of the bank might not show that it was the owner of the stock. He afterwards received dividends and securities in liquidation of such stock, and turned over the securities and paid part of the dividends to the bank, taking up his note and executing a new note for the balance of the dividend: Held, that he could not defend against such note in the hands of a receiver on the ground that he was an accommodation maker.—TILLINGHAST V. CARR, U. S. C. C., D. (Wash.), 82 Fed. Rep. 298.

8. BILLS AND NOTES — Extension of Note—Consideration.—The following indorsement placed on a note at its maturity, and signed by the payee: "November 21, 1894. Extended one year from date at the request of makers," etc.,—is a valid contract of extension, the consideration for which is the implied promise of the makers to pay interest during the entire period of extension, at the rate expressed in the note.—NELSON V. FLAGG, Wash., 50 Pac. Rep. 571.

9. BILLS AND NOTES—Payment.—Rulings on evidence on a trial by the court alone will not be reviewed, in the absence of exceptions to the findings. Indorsements of payment on a note, without other proof of payment or of the assent of the maker to the indorsements, is insufficient to establish payment by the maker, so as to remove the bar of limitations.—SCHLOTTFELDT V. BULL, Wash., 50 Pac. Rep. 590.

10. BILLS AND NOTES — Principal and Surety.—The makers of a note were a principal and appellants as sureties, who executed it to a bank cashier named as payee, for the purpose of enabling the principal to borrow money of the bank, so that he could complete a sewerage contract with plaintiff city, the completion of which appellants had undertaken by their bond. The principal delivered the note to plaintiff, which took it to the bank, which, together with said cashier, indorsed the same in blank, and returned it to plaintiff. The bank neither paid nor received any money, but plaintiff advanced to the principal the amount of the note with knowledge that appellants were sureties: Held, that appellants were not liable, as they executed a contract with said cashier, and he never accepted it. —CITY COUNCIL OF GREENVILLE V. ORMAND, S. Car., 28 S. E. Rep. 50.

11. BILLS AND NOTES — Transfer — Defenses.—Where the payee transfers a note in New York State, before maturity, in part payment of an existing debt, the courts of Texas will, in an action on the note, apply the rule laid down by the court of last resort of New York, that such transferee takes the note subject to

any defense available against the payee.—HOLT v. MC CANN, Tex., 42 S. W. Rep. 310.

12. BILLS AND NOTES—"Value Received."—The expression "value received" is not essential to the validity of a note, where no statute requires its use, as such paper at common law implies a consideration where none is expressed.—CLARKE v. MARLOW, Mont., 50 Pac. Rep. 713.

13. CARRIERS—Rights of Colored Passengers.—Where the servants in charge of a train permit white passengers to enter a coach set apart under the law and under the railroad company's regulations for colored passengers, the company is responsible for any annoyance or insult sustained by a colored passenger as the result thereof, though the employees may have had no knowledge of what was taking place.—WOOD v. LOUISVILLE & N. R. Co., Ky., 42 S. W. Rep. 349.

14. CARRIERS OF GOODS — Connecting Carriers.—The owner of goods consigned to a carrier for shipment has a cause of action against a connecting carrier by whose negligence or misfeasance they are injured, though there is no privity of contract between him and such connecting carrier.—UNITED STATES MAIL LINE Co. v. CARROLLTON FURNITURE MANUFG. Co., Ky., 42 S. W. Rep. 342.

15. CARRIERS OF PASSENGERS—Who are Passengers.—One employed by a railroad company to work on a bridge under a contract whereby, in addition to specified wages, he is to have daily transportation from his home to the bridge and return, is not an employee of the company while being transported from his work, but a passenger.—MCNULTY v. PENNSYLVANIA R. Co., Penn., 38 Atl. Rep. 524.

16. CERTIORARI—Impeachment of Record.—Where an attorney's name appears as signed to an acceptance of notice filed in a justice of the peace court, such attorney, on *certiorari* to review the record of such justice, cannot impeach the record by showing that he did not sign such acceptance.—CITY OF LOS ANGELES v. YOUNG, Cal., 50 Pac. Rep. 534.

17. COMBINATIONS IN RESTRAINT OF TRADE.—Defendant sold to plaintiff, his partner, his interest and good will in a manufacturing business for $17,500. Previous to such sale, plaintfff, unknown to defendant, had entered into an agreement with others in the same business, to effect, and afterwards did effect, a combination in said business, thereby enhancing the value of defendant's interest to $25,000: Held that, as the combination was illegal, equity would not aid in distributing the profits thereof, and defendant could recover on the ground of concealment of the real value of his interest.—MYERS v. MERILLION, Cal., 50 Pac. Rep. 662.

18. CONSTITUTIONAL LAW — Cities and Counties.—While the legislature cannot pass laws touching the organization of municipalities (Const. art. 11, § 6) without conforming to the requirements of the classification act (St. 1883, p. 24), yet under the concluding provision of Const. art. 11, § 6, declaring that "cities and towns heretofore or hereafter organized shall be subject to and controlled by general laws," it may, on matters not affecting the incorporation or organization, pass laws which will be general if they operate uniformly and generally on all cities of the class created by and designated in the acts themselves.—RAUER v. WILLIAMS, Cal., 50 Pac. Rep. 691.

19. CONSTITUTIONAL LAW—Jurors—Disqualification.—Acts 1897, ch. 52, disqualifying for jury service all persons shown to be engaged in a general conspiracy against law and order, does not contravene any constitutional provisions.—JENKINS v. STATE, Tenn., 42 S. W. Rep. 263.

20. CONSTITUTIONAL LAW — Tax on Laborer. — The Pennsylvania law of June 5, 1897, imposing on every employer of foreign-born unnaturalized male persons over 21 years of age a tax of three cents a day for each day that each of such persons may be employed, and authorizing the deduction of that sum from the wages of such employees, deprives the latter of the equal protection of the law, in violation of the fourteenth amendment to the constitution of the United States.—FRASER v. MCCONWAY & TORLEY Co., U. S. C. C., D. (Penn.), 82 Fed. Rep. 255.

21. CONTRACTS — Breach — Damages.—One who contracts with a corporation owning a patent to manufacture the articles covered thereby, and furnish them to it at cost, and provide the money necessary therefor, and for putting them on sale, not to exceed $10,000, and in consideration is to have a certain part of the company's stock, and be reimbursed for his expenditures, cannot terminate the contract at will, though it provides no time for its duration, but must give reasonable notice. — KENDERDINE HYDRO-CARBON FUEL Co. v. PLUMB, Penn., 38 Atl. Rep. 480.

22. CONVERSION — Assignment for Creditors.—An action for conversion is maintainable though the defendant came into possession and disposed of the property as an assignee for the benefit of creditors under the Wisconsin statute, as property in the hands of an assignee under that statute is not in the custody of the law or of a court. — JONES v. MCCORMICK HARVESTING MACH. Co., U. S. C. C. of App., Seventh Circuit, 82 Fed. Rep. 295.

23. CONTRACTS FOR PUBLIC WORKS — Waiver of Conditions.—Where a contractor, under a contract to construct a public building, gives a bond in the nature of a penalty for the benefit of the State, whose public buildings are not subject to liens, and the contract contains no express covenant to pay claims of materialmen and laborers, the State may waive its right to retain any sum reserved on account of stipulations in the contract respecting payments for labor and material.—MONTGOMERY v. SPENCER, Utah, 50 Pac. Rep. 623.

24. CONTRACTS — Variance by Parol.—Parol evidence may be introduced to show that a contract reciting that "A. W. Von Schmidt, president of the Von Schmidt Dredging Co., charters from the Southern Pacific Co.," two barges, "to be used as pontoons to hold up the discharge pipes of the dredging company," and signed "A. W. Von Schmidt, President Von Schmidt Dredge Co.," is the contract of the company, and not of Von Schmidt individually. — SOUTHERN PAC. CO. v. VON SCHMIDT DREDGE Co., Cal., 50 Pac. Rep. 651.

25. CORPORATIONS — Acts of Officers — Ultra Vires. — When the officers of a corporation wrongfully convey its real estate to a second corporation in payment for stock, and the secretary of the latter issues such stock to himself, he will hold it in trust for the corporation who paid for it.—BEAR RIVER VALLEY ORCHARD CO. v. HANLEY, Utah, 50 Pac. Rep. 611.

26. CORPORATIONS — Assessments—Shares of Stock.—1 Hill's Code, § 1507, providing for forfeiture and sale of stock for default in payment of assessments, does not give the corporation a lien upon such stock for unpaid assessments. — CLISE INV. CO. v. WASHINGTON SAV. BANK, Wash., 50 Pac. Rep. 575.

27. CORPORATIONS — Creditors' Suit against Stockholder. — Under the statute of Kansas giving a judgment creditor of a corporation the right to proceed by action to charge the stockholders with the amount of the judgment, such a creditor of a Kansas corporation may maintain an action in a federal court against a stockholder in another State, though the corporation is in the hands of a receiver. — AMERICAN FREEHOLD LAND-MORTGAGE CO., OF LONDON v. WOODWORTH, U. S. C. C., N. D. (N. Y.), 82 Fed. Rep. 269.

28. CORPORATIONS — Fraudulent Business Arrangement — Injunction and Receiver. — Where appellants joined in an arrangement for extending additional credit to an insolvent business corporation, whose insolvency was not known, whereby it was enabled to continue in business without apparent change of management, in consideration of receiving from the debtor corporation judgment notes for their entire indebtedness and being permitted to substitute their own appointees for the secretary and a majority of the

directors of such corporation, in order to prevent other preferences, their appeal from an interlocutory order, made in a suit by a subsequent creditor of such corporation, appointing a receiver, enjoining transfers, and requiring appellants to surrender to the receiver property, money, books, papers, and accounts in their possession, will be dismissed as without merit. — UNITED STATES RUBBER CO. v. AMERICAN OAK LEATHER CO., U. S. C. C. of App., Seventh Circuit, 82 Fed. Rep. 248.

29. CORPORATIONS — Liability of Stockholders. — The issuing of an execution, and the return of the same *nulla bona*, is a condition precedent, which must be fulfilled before the court can obtain jurisdiction, under paragraph 1192, Gen. St. 1889.—BEERS v. BUNKER, Kan., 50 Pac. Rep. 505.

30. COUNTIES — Bonds — Constitutional Debt Limit. — A county has no authority to issue warrants in payment of obligations that it undertook to create, after the debt limit of $400,000 fixed by Const, art. 8, § 1, had been reached, for matters that were not essential to governmental maintenance, though the entire indebtedness, minus the indebtedness for matters essential to governmental maintenance, was less than the debt limit.—DURYEE v. FRIARS, Wash., 50 Pac. Rep. 583.

31. CRIMINAL EVIDENCE—Entries in Bible.—An entry in a family Bible, made by a mother, is not competent evidence to prove the age of her child, when the mother is living, in view of Code Civ. Proc. pt. 4, § 4, making the written declaration of a deceased person admissible to prove the date of birth. — PEOPLE v. MAYNE, Cal., 50 Pac. Rep. 654.

32. CRIMINAL EVIDENCE — Conversations of Wife.—A conversation between accused and his wife while the former was in jail, and without warning that it might be used in evidence, is incompetent.—PENNY v. STATE, Tex., 42 S. W. Rep. 297.

33. CRIMINAL EVIDENCE — Homicide. — On a trial for the murder of one who had gone with a companion to defendant's house to interview him in respect to his assertion of title to land claimed by them, it was proper for the State to show, in opening its case, that when said parties, who were both killed during the interview, started for defendant's house, they were unarmed.—PEOPLE v. YOKUM, Cal., 50 Pac. Rep. 686.

34. CRIMINAL EVIDENCE—Murder—Previous Trouble. —It was competent on a prosecution for murder to show the general nature of any trouble between defendant and decedent before the homicide, though such evidence tended to degrade defendant in the minds of the jury, especially where defendant showed on cross-examination of the prosecuting witness that there was trouble between them. — PEOPLE v. COLVIN, Cal., 50 Pac. Rep. 539.

35. CRIMINAL EVIDENCE — Theft. — On a prosecution for stealing two calves, defendant having pleaded not guilty, though not claiming to own the two calves, may, as tending to weaken the State's case, show that other calves also found in defendant's possession, and likewise identified by the prosecuting witness as his, in fact belonged to defendant. — YATES v. STATE, Tex., 42 S. W. Rep. 296.

36. CRIMINAL LAW — Admissions to Prevent Continuance.—Under Cr. Code, § 189, which provides that, if the commonwealth admit the truth of the statements proposed to be proved by absent witnesses, a continuance shall not be granted on account of such absence, the commonwealth cannot introduce evidence to contradict statements which it has thus admitted to be true, for the purpose of preventing a continuance.—VINEGAR v. COMMONWEALTH, Ky., 42 S. W. Rep. 351.

37. CRIMINAL LAW—Affray—Offense against State and City.—An affray, though an offense, by statute, against the State, may by ordinance be made an offense against a city, so as to authorize prosecution under the ordinance. — EX PARTE FREELAND, Tex., 42 S. W. Rep. 295.

38. CRIMINAL LAW — Betting on Election.—Where defendant proposed to bet $25 on an election, and the other party to the bet put up $5, and defendant put up the $25 with the agreement that the $5 was to be forfeited unless the other $20 was put up within a specified time, and the $5 was forfeited to defendant, it did not constitute a betting on an election, authorizing a conviction therefor. — RICH v. STATE, Tex., 42 S. W. Rep. 291.

39. CRIMINAL LAW—Burglary.— On trial for burglary, evidence that defendants, being found in possession of the stolen goods, stated that they had bought them, and asked not be taken to jail, is admissible, without preliminary proof that the statements were voluntarily made, since they are not a confession of guilt. — PEOPLE v. ASHMEAD, Cal., 50 Pac. Rep. 681.

40. CRIMINAL LAW—Burglary.—The janitor of a public school building, and in control of the property therein, is the occupant of the building, and owner of the books therein, though the general property is shown to be in the pupils.—LAMATER v. STATE, Tex., 42 S. W. Rep. 304.

41. CRIMINAL LAW—Correction of Bill of Exceptions. —One convicted of a felony need not be present at the hearing of a motion by the State to correct a mistake in the bill of exceptions.—PEOPLE v. SOUTHERN, Cal., 50 Pac. Rep. 547.

42. CRIMINAL LAW—Forgery—Auditor's Warrant.—He who falsely indorses the name of the payee upon an auditor's warrant is guilty of forgery, within Hill's Pen. Code, § 63, making it forgery to alter an auditor's warrant, or to indorse an order, or to make an assignment of a writing obligatory, when done falsely, with intent to defraud.—STATE v. BARKULOO, Wash., 50 Pac. Rep. 577.

43. CRIMINAL LAW—Inquisition of Insanity.—There is no law of force in this State which makes it incumbent upon a judge of the superior court, at the time when judgment is to be entered, or after it has been entered, to allow or order a judicial investigation concerning the mental condition of one against whom a lawful verdict of guilty has been rendered in a capital case, and who has thereby become subject to the penalty of death; nor in either instance is a refusal by such judge to enter upon an investigation of this kind, with or without the aid of a jury, a denial to the prisoner of "due process of law."—BAUGHN v. STATE, Ga., 28 S. E. Rep. 68.

44. CRIMINAL LAW — Manslaughter.—On a trial for murder the evidence was conflicting as to whether defendant or deceased started the difficulty in which defendant was knocked down and roughly handled by deceased and another. Deceased finally let defendant get up on his saying he had enough, and did not want to fight. There was evidence that deceased afterwards started to look for his hat, and, while so doing, and making no further hostile demonstration toward defendant, the latter suddenly drew a pistol, and fired the fatal shot. Defendant's evidence was that deceased continued to challenge him to fight, and was advancing on him in a menacing manner when defendant shot. Deceased was not armed, and made no attempt to use a weapon; but he overmatched defendant in size and strength: Held, that the evidence supported a verdict of manslaughter.—PEOPLE v. BRITTAN, Cal., 50 Pac. Rep. 665.

45. CRIMINAL LAW—Second Appeal — Review.—Under a charge of assault with intent to commit murder, defendant was convicted of the lesser offense of assault with a deadly weapon, and a new trial was granted him, for insufficient evidence. On a second trial he was convicted of the higher offense, and on his motion a new trial was granted on the sole ground that he had been twice put in jeopardy for the same offense. On appeal by the people the judgment was reversed because he did not plead former jeopardy. The trial court, on return of *remittitur*, pronounced judgment on the verdict: Held, that the supreme court could not on appeal by defendant from such judgment, review

its former decision.—PEOPLE v. BENNETT; Cal., 50 Pac. Rep. 708.

46. CRIMINAL LAW—Sentence—Prior Conviction.—The only authority shown in a judgment roll for a conviction under Pen. Code, § 666, giving the court the right to consider a former conviction without the jury finding a special verdict therefor, where, as provided by section 1158, "the answer of the defendant admits the charge," was a recital in the udgment that, subsequent to the time the defendant was informed of the information against him, he "confesses the prior conviction:" Held sufficient, in the absence of specific code requirements as to how the "answer" should be shown.—PEOPLE v. MCNEILL, Cal., 50 Pac. Rep. 538.

47. CRIMINAL PRACTICE—Murder — Indictment.—An indictment for murder, which charges that defendant killed deceased by "beating her with his fists, and by choking her, and by pushing and dragging her into the water, and holding her under the water, whereby she was drowned," is sufficient, if all said acts constituted the means by which the crime was accomplished; and does not violate Hill's Ann. Laws, § 1273, providing that, "where the crime may be committed by use of different means, the indictment may allege the means in the alternative."—STATE v. FEISTER, Oreg., 50 Pac. Rep. 561.

48. CRIMINAL PRACTICE—Seduction.—An information alleging that defendant did "unlawfully, willfully, and feloniously, by persuasions, promise of marriage, and other false and fraudulent means, seduce, have sexual intercourse with, and debauch M, an unmarried woman of previous chaste character," sufficiently charges the crime of seduction.—STATE v. ROGAN, Wash., 50 Pac. Rep. 583.

49. DEED BY CORPORATION — Unsealed Deed.—A corporation can convey real property in the manner prescribed by the statutes, and not otherwise; and a deed executed by a corporation, and having the corporate seal, must be held effectual as a conveyance of title as against an unsealed deed of the same corporation for the same property, notwithstanding the latter deed, though made at a later time, was first recorded, and actual possession of the premises was taken under it.—ALLEN v. BROWN, Kan., 50 Pac. Rep. 505.

50. DIVORCE—Voluntary Dismissal of Suit.—Mill. & V. Code, § 3334, providing that the court may decree costs against either party, except a female in whose favor a decree is made, and may order the cost to be paid out of any property in the power of the court, does not authorize the chancellor, in a suit by a wife for divorce and alimony, wherein plaintiff has attached defendant's property, to tax the cost against defendant, and sell the attached property in payment thereof, where plaintiff voluntarily dismissed the suit before the return day of the writ.—HALL v. HALL, Tenn., 42 S. W. Rep. 273.

51. EASEMENTS — Water Companies—License.—The E Water Co., whose ditch headed in a river, agreed to allow the C Co. to take water from the E ditch, and a junction was effected some distance from the river. As a consideration for the agreement, the C Co. enlarged the E ditch from the river to the junction. The ditch was then placed under the joint control of the companies, and was maintained from the river to the junction at their mutual expense. The agreement ran for no definite period, and did not further define the rights of the parties: Held, that the right of the C Co. was a continuing easement.—CHICOSA IRRIGATING DITCH CO. v. ELMORO DITCH CO., Colo., 50 Pac. Rep. 781.

52. EASEMENT — Ways of Necessity.—While a way of necessity over the land of another ceases when the necessity ceases, yet, where there is another way than the one in question, it cannot be a way of necessity.—BENEDICT v. JOHNSON, Ky., 42 S. W. Rep. 335.

53. EJECTMENT—Judgment — Adverse Possession.—An executed judgment for plaintiff in ejectment, where the suit was commenced within the period of limitations, is conclusive against defendant of any asserted right founded merely on his possession either at the time of the commencement of the action or at the time of the judgment.—BREON v. ROBRECHT, Cal., 50 Pac. Rep. 689.

54. ELECTORS—Residence—Constitutional Law.—Section 3, art. 5, of the constitution, disables persons kept at any asylum at public expense, from acquiring a residence there for voting purposes. Therefore the inmates of the State Soldiers' Home, located in Ford county, who have removed there from other parts of the State, are disqualified from participating in the elections held in such county.—LAWRENCE v. LEIDIGH, Kan., 50 Pac. Rep. 600.

55. EMINENT DOMAIN — Construction of Railroad—Damage.—Where the nature and extent of a railroad company's liability, if any, depended largely upon the construction of the terms of an ordinance of a city of the second class, granting the defendant's lessor the right to build and maintain its tracks over and along certain streets of said city, it was error for the trial court to leave the construction of the ordinance entirely to the jury, without giving them any guidance as to the interpretation thereof.—ATCHISON, ETC. R. CO. v. ANDERSON, Kan., 50 Pac. Rep. 603.

56. EQUITY — Assumption of Debt.—A grantee of a debtor, by assuming payment of the debt, becomes, as between the two, the principal debtor, so that the grantor, without first making payment, may bring action to enforce payment by the grantee.—KRELING v. KRELING, Cal., 50 Pac. Rep. 547.

57. EQUITABLE LIENS—Partnership Associations.—W leased to B and others the fire clay on certain land, and a site for the erection of brick works, the lease providing that, as the lines of such site could not then be defined, the lessor would, on completion of the works, give the lessee a deed of the land occupied thereby. The lessees subsequently formed a limited "partnership association," and B borrowed money from W, which was used in the erection of the plant, giving his judgment note, with warrant of attorney to enter judgment on B's two-fifths interest in the plant of the association "now building and to be built," and such note was entered of record: Held, that the judgment was a lien on B's equitable interest in the land.—IN RE FAIR HOPE NORTH SAVAGE FIRE-BRICK CO.'S ESTATE, Penn., 38 Atl. Rep. 519.

58. EQUITY PLEADING—Amendment of Bill after Replication.—When the substance of the bill contains ground for relief, and the prayer and proofs are in conformity therewith, leave to amend, enlarging the claim of right, and changing the character or quantity of the relief sought, will not be granted after replication filed and proofs taken.—BASS, RATCLIFF & GRETTON v. CHRISTAIN FEIGENSPAN, U. S. C. C., D. (N. J.), 82 Fed. Rep. 260.

59. FEDERAL COURTS—Jurisdiction.—A suit to restrain the enforcement of a city ordinance limiting charges for artificial gas, on the ground that it allows no profit to the gas company, and therefore deprives it of its property without due process of law, and denies it the equal protection of the laws, contrary to the fourteeth amendment, is one involving a federal question, and a federal court has jurisdiction, regardless of the citizenship of the parties.—INDIANAPOLIS GAS CO. v. CITY OF INDIANAPOLIS, U. S. C. C., D. (Ind.), 82 Fed. Rep. 245.

60. FEDERAL COURTS—Jurisdiction — Equity Powers.—The federal courts have jurisdiction, and in the exercise of their general equity powers will grant relief, where the suit is a direct attack for the purpose of nullifying a judgment of a State court obtained by fraud or rendered without jurisdiction, and to enjoin a threatened sale of lands thereunder. — NORTHERN PAC. RY. CO. v. KURTZMAN, U. S. C. C., D. (Wash.), 82 Fed. Rep. 241.

61. FEDERAL COURTS—Jurisdiction of Suit for Legacy.—Pending the settlement of an estate in the probate court, a citizen of another State, who is a legatee under the will, may maintain a suit in the federal court

against the resident executor and the other legatees and heirs to recover such legacy.—BRENDEL V. CHARCH, U. S. C. C. (Ohio), 82 Fed. Rep. 262.

62. FRAUDS, STATUTE OF—Resulting Trusts.—The provision of the statute prohibiting the creation of trusts concerning lands, unless in writing, expressly excepts those arising by implication of law, and recognizes the existence and enforceability of such trusts where it is made to appear that by agreement, and without any fraudulent intent, the party in whom the title is vested was to hold the land in trust for the party paying the purchase money. — RAYL V. RAYL, Kan., 50 Pac. Rep. 501.

63. FRAUDULENT CONVEYANCES—Preferences—Fraud. —It is not fraudulent *per se* for a merchant to transfer his entire stock of goods to satisfy one creditor to the exclusion of other creditors. — IN RE MULLER, Cal., 50 Pac. Rep. 660.

64. FRAUDULENT CONVEYANCES — Right of Grantee to Confess. — The grantee in a conveyance attacked by a judgment creditor of the grantor as fraudulent may inquire into the ground of the judgment, and show that it does not give the attacking creditor a right to impeach the transfer; and, to that end, he may show that the judgment is for a liability created after the transfer.—GREGORY V. LAMB, Ky., 42 S. W. Rep. 339.

65. HOMESTEAD—Amount of Exemption.—Defendant, as head of a family, declared a homestead upon community property. Upon the death of his wife he was left childless. Plaintiff sued upon a debt contracted during the existence of the homestead: Held, that the homestead was exempt, to the amount of $5,000, under Civ. Code, § 1265, providing that, if the selection of homestead was made by a married person from community property, the land, on the death of one of the spouses, vests in the survivor. — ROBINSON V. DOUGHERTY, Cal., 50 Pac. Rep. 649.

66. HUSBAND AND WIFE — Community Property. — Where a husband received money belonging to his wife at the time of their marriage, in Tennessee, where they resided, when the common law was in force therein, declaring that marriage operated as a gift from the wife to the husband of all money and personalty held and owned by her at the date of the marriage, and reduced to possession by the husband during the marriage, and they afterwards removed to Texas, where he invested the money in land, the land was not community property, but the separate estate of the husband. — MCDANIEL V. HARLEY, Tex., 42 S. W. Rep. 323.

67. INJUNCTION — Solvency.—In an action to restrain defendant from collecting a certain judgment on the ground that, though standing in the name of defendant, an alleged agent of plaintiff, it was in fact the property of plaintiff, the insolvency of defendant was immaterial.—BENNETT BROS. CO. V. CONGDON, Mont., 50 Pac. Rep. 556.

68. INSURANCE—Conditions Subsequent.— Provisions of an insurance policy that are in the nature of conditions subsequent have no place in a declaration on the policy. They are matters of defense. — WHITTLE V. UNITED FIRE INS. CO., R. I., 38 Atl. Rep. 498.

69. INSURANCE—Misrepresentations.—A person named B, doing business under the firm name of B Bros., insured his goods in his firm name: Held, that his representation that the goods belonged to B Bros. was not a violation of the provision of the policy that it should be void if the insured had concealed or misrepresented any material fact, or if the interest of the insured was not truly stated. — BONNET V. MERCHANTS' INS. CO., Tex., 42 S. W. Rep. 316.

70. JUDICIAL SALE—Vacating Sale under Foreclosure. —Where a party, at whose instance a sale of real estate has been set aside, fully complies with the terms imposed by the court as conditions to setting aside the sale, it is error to enjoin a resale of the property under the judgment, merely because the officer to whom the purchaser paid the amount of his bid has made an unauthorized application of a portion of the money to the payment of taxes and costs, and refuses, for that reason, to pay to the purchaser the whole sum bid on demand.—CHAPIN V. PYLE, Kan., 50 Pac. Rep. 408.

71. JUSTICES OF THE PEACE — Jurisdiction. — Where two justices of the peace on the same day issue executions against the same debtor, one justice has no jurisdiction to declare void the execution issued by the other.—CARY V. ALLEGOOD, N. Car., 28 S. E. Rep. 61.

73. LANDLORD AND TENANT—Leases—Assignment.—An action of covenant by a lessor against an assignee of the lease, brought at the request of the lessee, who had not been released from his liability, is not such an election to treat the assignee as the lessee as will release the original lessee from liability. — WHITCOMB V. CUMMINGS, N. H., 38 Atl. Rep. 503.

73. LANDLORD AND TENANT — Subtenancy—Agency. — If M rented land from W, giving to the latter his promissory note for the rent, payable to W, and at the time of the renting W was himself a tenant of a certain company which was the true owner of the rented premises, and it appeared that M contracted with knowledge of the company's ownership, and thereafter a distress warrant issued against M at the instance of the company to collect the amount of rent specified in the note, the company being at that time the owner of the note, a motion for a nonsuit, made at the trial, on the ground that the relation of landlord and tenant did not exist between the parties, was properly denied. (*a*) Under the facts recited, M became a subtenant of the company; and, under the law of this State, a subtenant becomes the tenant of the owner, at the election of the latter. — MCCONNELL V. EAST POINT LAND CO., Ga., 28 S. E. Rep. 80.

74. LIBEL—Damages—Instructions.—In an action for a libel *per se*, plaintiff is entitled to compensatory damages, without regard to the good faith or caution which attended the publication. — TAYLOR V. HEARST, Cal., 50 Pac. Rep. 541.

75. LIFE INSURANCE—Fraudulent Change of Beneficiaries. — A declaration filed by children against the mother, which recites that a deceased father procured a policy of life insurance, in which the children were named as beneficiaries, but which, during the life of the father, and while he was *non compos mentis*, he was induced to change by fraud and undue influence of his wife so as to make her sole beneficiary, and alleging the death of the father and the collection of the policy by the mother, sets forth a good cause of action, and should not have been dismissed on demurrer. — CASON V. OWENS, Ga., 28 S. E. Rep. 75.

76. MALICIOUS PROSECUTION — Arrest without Warrant.—A city ordinance providing that any policeman shall arrest without warrant any person where the circumstances reasonably show that he has committed a felony or breach of the peace does not authorize the arrest without warrant of a person under circumstances tending to show that, a few minutes before, he had embezzled or stolen a sack of coal worth less than a dollar. — GRIFFIN V. SAN ANTONIO & A. P. RY. CO., Tex., 42 S. W. Rep. 319.

77. MARINE INSURANCE — Liability for Constructive Total Loss. — Underwriters are not liable for a constructive total loss, except where they consent to an abandonment under a policy containing a warranty against partial loss.—WASHBURN & MOEN MANUFG. CO. V. RELIANCE MARINE INS. CO., U. S. C. C. of App., First Circuit, 82 Fed. Rep. 296.

78. MASTER AND SERVANT — Fellow-Servants — Negligence.—A railroad employee, who, after finishing his employment for the day, and leaving the workshop and grounds of the company, is injured while moving along a public highway in the city, by negligent acts of other employees of the company on its moving trains, does not stand in the relation of a fellow-servant with them, in the meaning of the law applicable to injuries occurring to one servant by the negligence of another.—FLETCHER V. BALTIMORE & P. R. CO., U. S. S. C., 18 S. C. Rep. 35.

79. MORTGAGE—Payment — Application.—The holder of a debt secured by mortgage cannot apply in reduction or payment of the debt a claim owing by him to the debtor, under Code Civ. Proc. § 726, declaring that there shall be but one action for the recovery of any debt or the enforcement of any right secured by mortgage, which action must be in accordance with the provisions of "this chapter." — MCKEAN v. GERMAN-AMERICAN SAV. BANK, Cal., 50 Pac. Rep. 656.

80. MUNICIPAL CORPORATIONS — Disincorporation. — St. 1895, p. 115, provides for the disincorporation of cities of the sixth class, and makes it the duty of the board of trustees to call an election for such purpose upon receiving a petition in that behalf signed by not less than one-fourth of the qualified electors of the city: Held, that a complaint that avers that the petition was signed by the requisite number of qualified electors is good on demurrer, although the petition itself does not aver that the subscribers are such. — FREDERICK v. CITY OF SAN LUIS OBISPO, Cal., 50 Pac. Rep. 661.

81. MUNICIPAL CORPORATIONS—Liabilities Exceeding Revenue.—Judgment against a city for water furnished it can only be allowed to the amount of revenues for the respective fiscal years when water was furnished, which were unappropriated when the claims for water accrued.—HIGGINS v. CITY OF SAN DIEGO, Cal., 50 Pac. Rep. 670.

82. MORTGAGES — Taxes — Priority.—Acts 1871, ch. 68 (Mill. & V. Code, § 806), provides that when land is sold under decree the judge shall, before confirmation, direct a reference to ascertain whether on the day of sale there were any taxes unpaid which were a lien on the land, and, if there were, that there shall be a decree that such taxes be paid out of the first money collected from the sale: Held that, whenever the aid of a court is invoked to enforce the lien of a mortgagee by sale, the court will require that all taxes on the premises shall be first paid out of the proceeds of the sale, without reference to whether they were assessed before or after the mortgage lien attached.—DUNN v. DUNN, Tenn., 42 S. W. Rep. 259.

83. MORTGAGES—Trustee's Sale—Fiduciary Relations. —The fact that the trustee in a trust deed is a clerk in the store of the *cestui que trust* does not create a fiduciary relation between the makers of the deed and the *cestui que trust*, and hence it is competent for the trustee to sell the property at a trustee's sale to the *cestui que trust*.—MONROE v. FUCHTLER, N. Car., 28 S. E. Rep. 63.

84. MUNICIPAL CORPORATION—Bid Made by Mistake.—A bid for public work can be withdrawn, upon the ground of mistake, although the charter of the city contains a provision that bids cannot be withdrawn or canceled "until the board shall have let the contract for which such bid is made and the same shall have been duly executed."—MOFFITT CO. v. CITY OF ROCHESTER, U. S. C C., N. D. (N. Y.), 82 Fed. Rep. 255.

85. MUNICIPAL CORPORATIONS — Franchise — Forfeiture.—An ordinance granting a franchise to an electric company required the company within 15 months to construct so much of its plant as would furnish power, etc., to all the business portion of the city, and to expend in said construction not less than $50,000 the first year. It further provided that if, at the expiration of the time given "to make the improvements and expenditures," the same have not been made, then "this franchise is hereby declared to be forfeited:" Held, that a forfeiture was declared only in the event of failure to expend the money "and" make the improvements within the time specified.—COMMERCIAL ELECTRIC LIGHT & POWER CO. v. CITY OF TACOMA, Wash., 50 Pac. Rep. 592.

86. MUNICIPAL CORPORATIONS—Instructions.—In an action against a city to recover damages for overflowing plaintiff's lots by the improper construction of a sewer, it is error to submit to the jury the question of the ownership of the lots, without telling them what constitutes ownership or title.—MCARTHUR v. CITY OF DAYTON, Ky., 42 S. W. Rep. 343.

87. MUNICIPAL CORPORATIONS—Surface Water—From Streets.—A town is not liable for injury to abutting property from surface water, though it is turned thereon by reason of the highway and the drain thereunder being allowed to remain out of repair.—MURRAY v. ALLEN, R. I., 38 Atl. Rep. 497.

88. MUNICIPAL CORPORATIONS—Tide Lands — Extending Streets.—Const. art. 15, § 3, providing that municipal corporations shall have the right to extend their streets over tide lands, authorizes an extension only in the direct line of the street.—TOWN OF ILWACO v. ILWACO RY. & NAV. CO., Wash., 50 Pac. Rep. 572.

89. MUNICIPAL CORPORATIONS—Warrants.—In the absence of a law providing in what order city warrants shall be paid, the courts will direct such application as will be fair to the warrant holders, and yet subserve the best interests of the city, though the city treasurer, if permitted to exercise his discretion, would make a different application.—FIRST NAT. BANK OF NORTHAMPTON, MASS., v. ARTHUR, Colo., 50 Pac. Rep. 738.

90. MUNICIPAL CORPORATIONS — Water Companies—Power to Fix Rates.—Under Const. art. 14, providing that the rates of compensation for the use of water supplied to any municipal corporation shall be fixed annually by the governing body thereof, it is within the province of the courts to review such action to the extent, at least, of ascertaining whether the rates so fixed will furnish some reward for the property used and services furnished.—SAN DIEGO WATER CO. v. CITY OF SAN DIEGO, Cal., 50 Pac. Rep. 633.

91. NEGLIGENCE—Cotton Compress.—Where adjacent property was endangered by sparks emitted from the smokestack of a cotton compress, but the probable consequence of the operation of the compress was not such as to render the business a nuisance and unlawful, the compress company, both in constructing and operating its plant, was bound to take only such precaution and use such means to lessen the danger and prevent injury to adjacent property as a man of ordinary prudence, conversant with the business, and understanding its operation and the incidental danger to adjacent property, would have taken and used.—PLANTERS' WAREHOUSE & COMPRESS CO. v. TAYLOR, Ark., 42 S. W. Rep. 279.

92. NOVATION—Sale of Bonds Pledged as Collateral.—Where bonds of a corporation, pledged as collateral security for debts of the corporation, are subsequently sold by the board of directors, the purchaser assuming and agreeing to pay such debts, the sale does not create a novation of the indebtedness, so as in any wise to affect the rights of the creditor to proceed against the corporation, or its property in the hands of a receiver.—VANCE v. ROYAL CLAY MANUFG. CO., U. S. C., N. D. (Ohio), 82 Fed. Rep. 251.

93. NEGLIGENCE — What Constitutes.—To a declaration substantially alleging that the plaintiff sought to purchase a particular kind of loaded cartridges, and was negligently given, by defendant's agent to sell, certain loaded cartridges, which were represented to be of the kind asked for, and which were alleged to be very similar in size, make, and mark to those desired, but were in reality of different caliber, and that on account of such difference in caliber the plaintiff (he being without fault or negligence in handling the cartridges so purchased, and while using the same properly) was injured by the premature explosion of one of them: Held (1) That it was error to sustain a demurrer for want of a cause of action. (2) That the allegations in the declaration authorized a submission of the case to a jury to determine the facts involved,—among them, whether or not the injury could have been avoided by the plaintiff in the exercise of ordinary care.—SMITH v. CLARKE HARDWARE CO., Ga., 28 S. E. Rep. 74.

94. NUISANCE—Division Fences and Walls.—A structure standing wholly on the lot of the owner thereof is not within the inhibition of St. 1885, p. 45, regulating

the height of "division fences" and "partition walls" in cities and towns.—INGWERSEN v. BARRY, Cal., 50 Pac. Rep. 536.

95. PARTITION—Judgment.—The fact that one of the parties against whom a judgment in partition was rendered was a minor who was not represented by a guardian *ad litem* did not invalidate the judgment; said minor, during pendency of the suit, having transferred his interest in the land to the party in whose favor the judgment was rendered.—SHELBURN v. MCCROCKLIN, Tex., 42 S. W. Rep. 329.

96. PARTNERSHIP — Dissolution—Good Will.—A firm composed of W, D, and S dissolved on the death of W, and D and S separated. The old firm had a large list of customers in its business of insurance. A third person, knowing that S had a right to compete for the continuance of the insurance business with the old customers, paid him a sum of money to be admitted into partnership with him: Held, that there was no sale of the good will of the old firm, so as to entitle D to an accounting.—DYER v. SHOVE, R. I., 38 Atl. Rep. 498.

97. POSTMASTER — Liability of Money Embezzled by Clerk.—It is no defense to an action on the official bond of a postmaster, to recover public funds unaccounted for, that such funds were embezzled by a clerk appointed under the civil service laws.—UNITED STATES v. BRYAN, U. S. C. C., N. D. (Cal.), 82 Fed. Rep. 290.

98. PRINCIPAL AND SURETY — Official Bonds—County Trustee.—Where it is claimed in an action on the bond of a county trustee that he was delinquent for a previous term, and that funds subsequently collected were improperly applied as credits on such previous delinquency, the surety must show such misappropriation by dates, items, and amounts, and that specific items were improperly credited, before he can raise an equity to be relieved or credited by such items.—STATE v. HAYS, Tenn., 42 S. W. Rep. 266.

99. PRINCIPAL AND SURETY — Subrogation.—A surety paying without suit a note providing for attorney's fees in case of a suit is subrogated to the payee's rights under such provision, and may recover such attorney's fees in a suit against the maker.—BEVILLE v. BOYD, Tex., 42 S. W. Rep. 318.

100. REAL ESTATE BROKERS—Production of Purchaser—Commission.—An owner listed lands with an agent, who afterwards told him of a prospective purchaser that wished to deal directly with the owner. The owner then agreed to pay the agent a commission for the mere production of a purchaser. The purchase was made by the person introduced, and at the price at which the lands were listed: Held, that the fact that the contract between the owner and the agent was concealed from the purchaser, since he was not thereby required to pay an increased price, did not taint the contract with fraud, so as to release the owner from liability for the agent's commission.—MCCAMPBELL v. CAVIS, Colo., 50 Pac. Rep. 728.

101. RECEIVERS — Dividends.—Where a creditor fails to avail himself of an order of court directing a receiver to distribute money of an insolvent bank then on hand, the creditor does not thereby obtain a lien upon the remaining assets for his *pro rata* share in such fund.—ROCKWELL v. PORTLAND SAV. BANK, Oreg., 50 Pac. Rep. 566.

102. RECEIVERS—Property Subject to Order.—Defendant was directed by judgment to make a certain payment in money, and in default thereof the court ordered specified real estate to be sold, the proceeds to be applied on said judgment, and, in case of a deficiency, judgment therefor to be docketed against defendant: Held, that the court could not take into its custody, through a receiver, any property not embraced in the judgment.—KRELING v. KRELING, Cal., 50 Pac. Rep. 549.

103. REFERENCE — Powers of Referee.—The terms of the order of reference determine the scope of a referee's authority, and a reference to state an account gives him no authority to try and determine the whole issue.—BRADSHAW v. MORSE, Mont., 50 Pac. Rep. 554.

104. REMOVAL OF CAUSES — National Bank Receivers.—A receiver of an insolvent national bank, appointed by the comptroller of the currency, against whom an action is brought in a State court to recover less than $2,000, has no right to remove the same to a federal court. — FOLLETT v. TILLINGHAST, U. S. C. C., D. (Wash.), 82 Fed. Rep. 241.

105. REVIVAL OF ACTIONS—Presumption on Appeal.—An action having been brought by two persons as partners, one of whom died before the case came to trial, and a judgment having been rendered in favor of the survivor and the executors of the deceased partner as his successors in interest, it will be presumed, in the absence of any showing in the record to the contrary, that the action was duly revived before the trial.—KELLEY v. STEVENS, Kan., 50 Pac. Rep. 595.

106. SALE—Delivery—Change of Possession.—Plaintiff, by contract in writing, purchased a flock of lambs, and branded each with his own brand, and at the same time entered into an agreement by which the vendor was to care for them, as plaintiff's agent. Thereafter the vendor kept the lambs separate from others, and marked the wool separately: Held, that there was a sufficient delivery and parting with the ownership, and that the contract was valid as to attaching creditors of the vendor. — CADY v. ZIMMERMAN, Mont., 50 Pac. Rep. 553.

107. SALE — Principal and Agent. — A principal's appropriation and sale of part of the goods purchased by his agent without authority is a ratification of the entire transaction. — MOFFITT-WEST DRUG CO. v. LYNEMAN, Colo., 50 Pac. Rep. 737.

108. SALE—Retention of Title.—Where one sells sewer pipe to the contractor for construction of a ditch for a county, by agreement providing that it shall be shipped to a certain point by the seller, taken from there by the contractor, and paid for by orders on the county after it is put in the ground, title does not remain in the seller till after the pipe is paid for.—BAKER v. HEIDINGER, Wash., 50 Pac. Rep. 569.

109. SEDUCTION—Evidence. — In a prosecution for seduction it is competent for the State to show other acts of sexual intercourse between defendant and prosecutrix since the date of the act alleged. — STATE v. ROBERTSON, N. Car., 28 S. E. Rep. 59.

110. TAXATION—Assessment.—Where part of the land conveyed to one C, was separately assessed in the unseated list, the fact that the number of acres mentioned in an assessment to C of a larger tract, as seated land, substantially corresponded with the acreage mentioned in C's deed, was not conclusive that the larger assessment included the unseated land.—EVERHART v. NESBITT, Penn., 38 Atl. Rep. 525.

111. TAXATION — Injunction Against Collection. — Though a tax law be unconstitutional, equity will not enjoin the collection of taxes thereunder unless it is shown, not only that plaintiff would be without remedy at law, but that the enforcement of the tax would produce irreparable injury, or lead to a multiplicity of suits, or bring a cloud upon his title.—WASON v. MAJOR, Colo., 50 Pac. Rep. 741.

112. TAXATION—Mortgagor and Mortgagee. — Const. art. 13, § 4, providing that for purposes of taxation and assessment a mortgage shall be deemed an interest in the property affected thereby but speaking of the holder of the legal title as the owner of the property, and making the taxes assessed against the security as well as those against the property liens on the latter, and providing that a payment by the owner of the property of the tax levied on the security shall, to the extent thereof, discharge the security; and Pol. Code, § 3617, which, treating of revenue, and defining the term "real estate," declares that a mortgage, when land is pledged for the payment thereof, shall, for the purpose of assessment and taxation, be deemed an interest in the land—do not give the mortgagee a distinct

real property in the land, on which the lien of taxes assessed against the holder of the legal title cannot attach—CALIFORNIA LOAN & TRUST CO. v. WEIS, Cal., 50 Pac. Rep. 697.

118. TAXATION OF FOREIGN CORPORATION.—The relator was a New Jersey corporation, organized for the purpose of investing its capital in the securities of an Illinois corporation, and distributing the profits. It maintained an office in New York, with several salaried employees. Its whole capital was invested in the stock of the Illinois corporation, which was deposited with a New York trust company as security for an issue of bonds by the relator, whose whole business consisted in the collection and distribution of the dividends on the Illinois stock. It carried an average balance in a New York bank of over $25,000, derived from such dividends: Held, that the relator, though it was doing business in New York, and had property there, did not employ any part of its capital in that State, and so was not taxable under Laws 1880, ch. 542, as amended by Laws 1885, ch. 501, and subsequent enactments.—PEOPLE v. ROBERTS, N. Y., 47 N. E. Rep. 974.

114. TAXATION OF SAVINGS BANKS — Deposits.—The primary relation of a depositor in a savings bank to the corporation is that of a creditor, and, for the purpose of ascertaining the amount of property of a savings bank liable to taxation, the amount of its deposits is to be deducted from its gross assets, as a liability.—PEOPLE v. BARKER, N. Y., 47 N. E. Rep. 973.

115. TAXATION—Valuation of Property.—Under sections 2 and 3, art. 13, Const., all taxable property within this State must be assessed and taxed on a valuation fixed at its actual cash value, or as near such value as is reasonably practicable. The test of such value is the cash price for which the property valued would sell in open market.—STATE v. THOMAS, Utah, 50 Pac. Rep. 615.

116. TRADE-MARKS—Infringement.—Where the name, portrait and *fac simile* signature of another are employed without his consent and against his will, and are so assumed with a view to deceive the public into the belief that the product marketed and sold was prepared under his supervision, and offered to the public with his sanction, an injunction will be granted.—KATHREINER'S MALZKAFFEE FABRIKEN MIT BESCHRAENKTER HAFTUNG v. PASTOR KNEIPP MEDICINE CO., U. S. C. C. of App., Seventh Circuit, 82 Fed. Rep. 321.

117. TRUSTEES—Investments—Liability for Depreciation.—Trustees are not liable for losses resulting from the depreciation of authorized investments made in good faith, where they use all ordinary care in determining on the investment.—IN RE BARTOL, Penn., 38 Atl. Rep. 527.

118. TRUSTS — Sufficiency of Evidence. — Where a widow purchased the interests of her children in certain real estate devised to her for life, remainder to them, their claim that she paid for their interests with the proceeds of personal estate in which they had an interest, and therefore holds in trust for them, is not sustained by the evidence.—POOL v. DETRAZ, Ky., 42 S. W. Rep. 346.

119. VENDOR'S LIEN—Foreclosure—Setting Aside Sale.—After eight months of unexcused delay, a sale under a judgment foreclosing a vendor's lien, at which the vendee was present and objecting, will not be set aside on the ground of an irregularity in the sheriff's advertisement.—HORNE v. KIMBELL, Tex., 42 S. W. Rep. 325.

120. VENDOR'S LIEN—Notice.—When a recorded deed recites that certain notes are given in part payment, and that the vendor's lien is reserved to secure the notes, a subsequent purchaser is charged with notice of such lien.—LINDLEY v. NUNN, Tex., 42 S. W. Rep. 311.

121. VENDOR AND PURCHASER—Executory Contract.—A purchaser in possession under a title bond is treated as the equitable owner, and may mortgage, sell or devise his interest.—SKAGGS v. KELLY, Tenn., 42 S. W. Rep. 275.

122. VENDOR AND VENDEE—Fixtures.—Improvements permanently attached to land by a vendee in possession under an executory contract of purchase became part of the land, and cannot be removed by the vendee without the vendor's consent.—POMEROY v. BELL, Cal., 50 Pac. Rep. 683.

123. WATERS—Appropriation—Pleading. — Comp. St. 1887, div. 5, ch. 74, relating to water rights, requires a notice of location to be posted at the point of diversion, and the appropriator to file with the county recorder a notice of appropriation. Section 1257 (Civ. Code 1895, § 1888) provides that a failure to comply with the provisions of the chapter deprives the appropriator of the right to the water, as against a subsequent claimant who complies therewith, but by complying with the provisions of the act the right to the use of the water shall relate back to the date of posting the notice: Held, that the only effect of the statute is to give the appropriator complying therewith the benefit of the doctrine of "relation back," and priority according to the date of posting notice, and a water right may be acquired, without complying with the statute, which is good against all subsequent appropriators, by the actual diversion and appropriation of the water of a stream for a beneficial use.—MURRAY v. TINGLEY, Mont., 50 Pac. Rep. 723.

124. WILL—Codicil—Construction.—Though a codicil that changes a will must prevail, yet both the will and codicil must be construed together, and the one general intent pervading both must be gathered.—HUNT v. HUNT, Wash., 50 Pac. Rep. 578.

125. WILL—Contest—Burden of Proof.—The burden is on the contestants of a will to show incapacity, fraud, or undue influence; and, unless the paper presented for probate is irrational or inconsistent, it is not necessary for the attesting witnesses to prove the capacity of the person executing it.—KING v. KING, Ky., 42 S. W. Rep. 347.

126. WILL—Limitations — Charges on Real Estate.—Even if a will charges debts of testator on his real estate, the lien of the debts will be lost by statutory limitation, unless the will also creates an express trust for their payment. A trust giving testator's debts a lien on his real estate unaffected by statutory limitation is not created by his will directing generally that all his debts be paid as soon as may be, devising specified land to certain sons, and giving the residue of his real estate to the remaining son, thereafter directing that said son pay three-fourths of all testator's debts and legacies, and that another son pay the remaining fourth thereof, dividing his personal estate among his children equally, and appointing as executors the two sons directed to pay the debts.—IN RE MITCHELL'S ESTATE, Penn., 38 Atl. Rep. 489.

127. WILL—What Constitutes.—A letter to an undertaker, authorizing him to have the writer's body cremated, closed as follows: "My brother P will take charge of my estate, and be the sole administrator, without bonds, to trade, sell or occupy, as may seem to him fit:" Held, that the letter did not appoint an executor, nor make any devise, and was not entitled to probate as a will.—IN RE MEADE'S ESTATE, Cal., 50 Pac. Rep. 541.

128. WITNESS—Cross-Examination.—Where a prosecuting witness stated that he was assaulted by one wearing an overcoat like one that was exhibited to him, it was error to refuse to have him on cross-examination answer as to whether on a former trial he had not positively identified the overcoat as being worn by his assailant, whose identity was a question in dispute.—PEOPLE v. TURNER, Cal., 50 Pac. Rep. 537.

129. WITNESSES — Transaction with Deceased. — A party claiming under a contract made with a firm, one of whose members died before the trial, was competent to rebut the testimony of the surviving partner in reference to the transaction.—HUNTLEY v. GOODYEAR, Penn., 38 Atl. Rep. 507.

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